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2533-
No. 11953

United States
Court of Appeals
for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING
AND MINING COMPANY, a corporation,
FIRST NATIONAL BANK OF FAIR-
BANKS, Executor of the Estate of Gustaf
Soderblom and WALTER JENSEN,
Appellees.

Transcript of Record

Appeal from the District Court of the United States
for the Territory of Alaska, Fourth Judicial
Division

FILED
NOV 1 - 1948

PAUL P. O'BRIEN, -

No. 11953

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for the Ninth Circuit

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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ATTORNEYS OF RECORD

SOUTHALL R. PFUND,
CHARLES J. CLASBY,
Fairbanks, Alaska,

Attorneys for Plaintiffs and Appellees.

BAILEY E. BELL,
Fairbanks, Alaska,

Attorney for Defendant and Appellant.

In the United States District Court for the
Territory of Alaska, Fourth Judicial Division

No. 5493

UNITED STATES SMELTING REFINING &
MINING COMPANY, a Maine Corporation,
Plaintiff,

vs.

EMMA GRACE LOWE,

Defendant.

COMPLAINT IN SUPPORT OF
ADVERSE CLAIM

Plaintiff complains of defendant and for cause
of action alleges:

I.

That the Plaintiff at all times mentioned in this
complaint has been and is now a citizen of the
United States of America.

II.

That the plaintiff, United States Smelting, Re-
fining and Mining Company, is a corporation or-
ganized and existing under and by virtue of the
laws of the State of Maine and is duly qualified to
do business within the Territory of Alaska, and
has paid its annual corporation tax last due, and
has filed its annual report for the last calendar
year.

III.

That prior to March 15, 1908, the property here-
inafter described was a part of the public domain
and was unoccupied and unclaimed mineral land,

and on said date by virtue of compliance on the part of plaintiff's predecessors in interest with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and the local rules, regulations and customs of miners, plaintiff's predecessors in interest were and plaintiff and its said predecessors in interest ever since have been and are now the owners, subject only to the paramount title of the United States, and have been and are now in possession of the following described property, to-wit:

That certain placer mining claim commonly known as "The Snow [1*] Shoe Fraction," situate on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, and more particularly described as follows:

A fraction of 10 acres of placer mining ground, more or less, situated below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit, the location certificate of which was recorded in Volume 10 of Location Records, at page 113 thereof, as Instrument No. 23502.

IV.

That by virtue of the premises plaintiff has and claims the right to occupy and possess said The Snow Shoe Fraction placer mining claim and the mineral land embraced therein, and plaintiff is in

*Page numbering appearing at foot of page of original certified Transcript of Record.

possession thereof and is entitled to the possession thereof.

V.

That on May 26, 1945, defendant, Emma Grace Lowe, filed in the District Land Office of the United States at Fairbanks, Alaska, a certain plat of a survey of certain purported placer mining claims, together with her application for United States patent for said purported claims, naming and calling said purported claims in said plat and said application, "Scorpion Association," "Jupiter Association," and "Saturn Association," which survey and plat were designated as Mineral Survey No. 2105, and said defendant did on June 8, 1945, give notice that she would apply for United States patent for said purported placer mining claims and caused a notice of said application to be published in "Jessen's Weekly," a weekly newspaper published at Fairbanks, Territory of Alaska, the first publication of which notice appeared on June 5, 1945, and the last publication of which appeared on August 3, 1945.

VI.

That thereafter and within the time prescribed by law, to-wit, on March 29, 1946, plaintiff filed its adverse claim in said Land Office, and this suit is brought before the expiration of the period of 60 days after the filing of said adverse claim, in support thereof and for the purpose of determining the same and the right of possession to said The Snow Shoe Fraction placer mining claim.

VII. [2]

That the defendant claims an estate and interest in said The Snow Shoe Fraction placer mining claim and the mineral land adverse to plaintiff, and that said claim of defendant is without any right whatsoever, and said defendant has no estate, right, title or interest whatever in said The Snow Shoe Fraction placer mining claim, or any part thereof.

Wherefore, plaintiff prays judgment as follows:

1. That plaintiff's title to said The Snow Shoe Fraction placer mining claim and the land included therein be quieted and that defendant be required to set forth any claim thereto, and that said adverse claims be determined by decree of this court;

2. That by said decree it be adjudged defendant has no estate or right, title or interest whatever in or to said The Snow Shoe Fraction placer mining claim, or the land included therein, and that the right, title and interest of plaintiff therein, subject only to the paramount title of the United States of America, is good and valid;

3. For costs of suit herein incurred; and

4. For such other and further relief as is meet and proper in the premises.

/s/ SOUTHALL R. PFUNG,
Attorney for Plaintiff.

(Duly Verified.)

[Endorsed]: Filed May 27, 1946. [3]

In the United States District Court for the
Territory of Alaska, Fourth Judicial Division

No. 5494

GUSTAF SODERBLOM, WALTER JENSEN,
and UNITED STATES SMELTING, REFIN-
ING and MINING COMPANY, a Maine cor-
poration,

Plaintiffs,

vs.

EMMA GRACE LOWE,

Defendant.

COMPLAINT IN SUPPORT
OF ADVERSE CLAIM

Plaintiffs complain of defendant and for cause
of action allege:

I.

That the plaintiffs, and each of them, are and
at all times mentioned in this complaint have been
and are now citizens of the United States of Amer-
ica.

II.

That the plaintiff, United States Smelting, Re-
fining and Mining Company is a corporation or-
ganized and existing under and by virtue of the
laws of the State of Maine and is duly qualified
to do business within the Territory of Alaska, and
has paid its annual corporation tax last due, and
has filed its annual report for the last calendar
year.

III.

That prior to March 20, 1908, the property hereinafter described was a part of the public domain and was unoccupied and unclaimed mineral land, and on said date by virtue of compliance on the part of plaintiffs' predecessors in interest with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and the local rules, regulations and customs of miners, plaintiffs' predecessors in interest were and plaintiffs and their said predecessors in interest ever [5] since have been and are now the owners, subject only to the paramount title of the United States, and have been and are now in possession of the following described property, to wit:

That certain placer mining claim commonly known as "L Association," situate on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, and more particularly described as follows:

Beginning at Corner No. 1, which is situated 1300 feet northeast of the junction of Fairbanks and Fish Creek, and is common with the southwest corner of Frost Claim, M. S. 1690; thence in a southwesterly direction approximately 550 feet to Corner No. 2; thence in a southwesterly direction approximately 1350 feet to Corner No. 3; thence in a northwesterly direction approximately 550 feet to Corner No. 4; thence in a northwesterly direction approximately 1280 feet to Corner No. 5; thence in a southwesterly direction approximately

1450 feet to Corner No. 6; thence in a southeasterly direction approximately 1450 feet to Corner No. 7; thence in a northeasterly direction approximately 660 feet to Corner No. 8; thence in a southeasterly direction approximately 950 feet to Corner No. 9; thence in a northeasterly direction approximately 2100 feet to Corner No. 10; thence in a northeasterly direction approximately 1350 feet to Corner No. 11; thence in a northwesterly direction approximately 1300 feet to Corner No. 1, initial post and place of beginning. Said claim is a creek claim, situated below discovery.

IV.

That by virtue of the premises plaintiffs have and claim the right to occupy and possess said L Association placer mining claim and the mineral land embraced therein, and plaintiffs are in possession thereof and are entitled to the possession thereof.

V.

That on May 26, 1945, defendant Emma Grace Lowe filed in the [6] District Land Office of the United States at Fairbanks, Alaska, a certain plat of a survey of certain purported placer mining claims, together with her application for United States patent for said purported claims, naming and calling said purported claims in said plat and said application, "Scorpion Association," "Jupiter Association," and "Saturn Association," which survey and plat were designated as Mineral Survey No. 2105, and said defendant did on June 8, 1945, give notice that she would apply for United States

patent for said purported placer mining claims and caused a notice of said application to be published in "Jessen's Weekly," a weekly newspaper published at Fairbanks, Territory of Alaska, the first publication of which notice appeared on June 5, 1945, and the last publication of which appeared on August 3, 1945.

VI.

That thereafter and within the time prescribed by law, to-wit, on March 29, 1946, plaintiffs filed their adverse claim in said Land Office, and this suit is brought before the expiration of the period of 60 days after the filing of said adverse claim, in support thereof and for the purpose of determining the same and the right of possession to said L Association placer mining claim.

VII.

That the defendant claims an estate and interest in the said L Association placer mining claim and the mineral land adverse to plaintiffs, and that said claim of defendant is without any right whatsoever, and said defendant has no estate, right, title or interest whatever in said L Association placer mining claim, or any part thereof.

Wherefore, plaintiffs pray judgment as follows:

1. That plaintiffs' title to said L Association placer mining claim and the land included therein be quieted and that defendant [7] be required to set forth any claim thereto, and that said adverse claims be determined by decree of this court;

2. That by said decree it be adjudged defendant has no estate or right, title or interest whatever

in or to said L Association Placer mining claim, or the land included therein, and that the right, title and interest of plaintiffs therein, subject only to the paramount title of the United States of America, is good and valid;

3. For costs of suit herein incurred; and

4. For such other and further relief as is meet and proper in the premises.

/s/ SOUTHALL R. PFUND,
Attorney for Plaintiffs.

(Duly Verified.)

[Endorsed]: Filed May 27, 1946.

[8]

[Title of District Court and Cause No. 5493.]

ANSWER OF DEFENDANT

Comes now the defendant, appearing in proper person, and, for answer to plaintiff's complaint in support of adverse claim on file herein, admits, denies and alleges as follows:

FIRST DEFENSE—ADMISSIONS AND DENIALS

I.

Admits the allegations of paragraphs I and II of plaintiff's complaint.

II.

Answering paragraph III thereof, admits that prior to March 15, 1908, the land therein attempted to be described, (if and to the extent it is in con-

flict with the mining claims of the defendant, hereinafter mentioned), was a part of the public domain, and was unoccupied and unclaimed mineral land, and denies the remaining allegations of said paragraph and specifically denies that the attempted location of the so-called Snow Shoe Fraction claim was of any force, effect or validity.

III.

Denies the allegations of paragraph IV of said complaint.

IV.

Admits the allegations of paragraph V thereof, excepting any inference of invalidity from the use of the word "purported" in connection with defendant's locations, and in that regard alleges that, as hereinafter set forth, this defendant's claims are, in all respects, good, valid and subsisting locations. [10]

V.

Admits paragraph VI of said complaint.

VI.

Admits that this defendant claims an estate and interest in the ground alleged to be covered by the said Snow Shoe Fraction Claim, if and to the extent the same conflicts with her said Jupiter Association, Scorpion Association and/or Saturn Claims (according to the allegations of the adverse claim as hereafter set forth, it is now alleged to cover a small triangle in the northeast corner of the Scorpion Association) and denies the allegations of paragraph VII, except as admitted.

**SECOND DEFENSE—AFFIRMATIVE
MATTER:**

And for a second and affirmative defense to the allegations of plaintiff's said complaint, defendant alleges as follows:

I.

That on and prior to March 15, 1908, the ground covered by the plat and survey of the Scorpion Association, Jupiter Association and Saturn placer mining claims, being mineral survey No. 2105, referred to in paragraph V of plaintiff's complaint, was vacant, unappropriated mineral land; that on said date one W. E. Sullivan, who plaintiff claimed as its predecessor in interest, apparently sought to locate the so-called Snow Shoe Fraction claim, upon a portion of the same, or other lands in that locality. That the said attempted location of the Snow Shoe Fraction claim was wholly insufficient, illegal and void, and did not comply with the laws of the United States, or the Territory of Alaska, or the rules and regulations prescribed by the Land Department of the United States, or the local rules, regulations and customs of miners then in force and effect in that district, in that, among other things, the boundaries of said purported claim were not marked so that the same could be readily traced, or at all, no discovery of minerals was made thereon until many years afterwards, and the purported location notice alleged to have been posted upon said claim and thereafter [11] and on June 11, 1908, recorded in Volume 10, page 113, Records of Location, did not contain such a description of the claim located by reference to some natural ob-

ject or permanent monument as would identify the claim, but, on the contrary, the said location notice was in words and figures as follows:

“23502. Notice of Location.

Notice is hereby given that the undersigned has located a fraction of 10 acres of placer mining ground, more or less, situated in Fairbanks Mining District of Alaska, on Fish Creek, Tributary of Little Chena to be known as The Snow Shoe Fraction described as follows, to-wit: Below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit.

Gold discovered—190—

Located March 15, 1908

W. E. Sullivan, Locators.”

That said description, which is the same as the description set forth in plaintiff's complaint, was and is wholly insufficient to identify the said ground sought to be covered thereby, or to enable any third party to locate the claim or establish the boundaries thereof.

II.

That further the boundaries of said claim have been changed many times since the purported location thereof in 1908, and particularly since the year 1913, but the location notice has never been amended as required by law in such cases. That as appears from the allegations of paragraphs V and VI of plaintiff's complaint, this is a suit brought in support of an adverse claim filed by plaintiff in the Land Office, in connection with a

patent proceeding brought by this defendant upon the said Scorpion Association, Jupiter Association and Saturn claims, mineral survey No. 2105. That the plaintiff's adverse claim filed in the Land Office on March 29, 1946, as alleged in paragraph VI of plaintiff's complaint, has attached to it as Exhibit B a plat showing the land now claimed as covered by the said Snow Shoe Fraction claim. That such land [12] bears no resemblance or connection whatsoever to the ground originally claimed under the Snow Shoe Fraction location, as described in the original location notice, and in plaintiff's complaint; but, on the contrary, purports to cover a small wedge-shaped parcel containing less than two acres, lying in the extreme northeast corner of the Scorpion Association claim, being approximately 565 feet in length along the south side and 181 feet along the west end, and 650 feet at the north side, running to a point on the east end, and not touching or approaching Fish Creek at any point. That there is accordingly a complete and total variance between the allegations of plaintiff's complaint and said adverse claim.

III.

In addition thereto, the ground now claimed under the Snow Shoe Fraction is entirely different from the ground originally said to be covered thereby and such present claim is based upon no location or amendment of a previous location whatsoever, and is wholly void.

IV.

That the plaintiff, and its predecessors, did not

do the annual assessment work required by law upon the so-called Snow Shoe Fraction claim during each year following the date of such alleged location, but, on the contrary, during many of such years they wholly failed to perform such work or otherwise protect the said location. Among other defaults, defendant directs attention to the following:

(a) No labor or improvements were performed or made, nor was any affidavit of labor filed for any year prior to the year 1915 and proof of labor was filed by the original locator Sullivan for 1915; although, to the best knowledge and belief of the defendant, proper and sufficient work to protect the claim was not actually done.

(b) During the years 1917 and 1918, while the moratorium during the first world war was in effect, no assessment work was done, but in 1917 a suspension notice was filed on behalf of the locator Sullivan, and in 1919 Sullivan personally claimed exemption for that year. [13]

(c) No annual assessment work was done or proof of labor filed for the years 1919 to 1922; for the fiscal year July 1, 1922, to July 1, 1923, the proof of labor was filed although the defendant is without knowledge as to the amount and character of the work actually done. Thereafter no labor or improvements were performed or made and no proof of labor filed until 1928, when this claim, together with a large number of other claims was transferred to The First National Bank of Fairbanks to hold as trustee. Thereafter, for the fiscal

years 1928 and 1929, proofs of labor was filed upon this and a large number of other claims on behalf of said Bank. That the said proofs of labor allege drilling in connection with a proposed dredging operation; that the said dredging operation was never in fact commenced and shortly thereafter the claims were re-conveyed by the Bank to the original owners and defendant therefore alleges that under the circumstances the said drilling was not proper assessment work for the claims in the group according to the best knowledge and belief of the defendant and no drill holes were actually placed upon the said Snow Shoe Fraction claim.

(d) That no labor or improvements were performed or made, and no proofs of labor filed until the suspension statute came into force during the depression years. In 1933 and 1934 suspension was claimed by, among others, Messrs, Hess, McCandlish and Sullivan, who were then the record owners of the said Snow Shoe Fraction. In connection with the 1934 assessment, two of said claimants, Messrs. Hess and McCandlish, had already claimed a suspension upon the maximum amount of acreage allowed to them under the 1934 suspension act.

(e) No labor was performed or improvements made upon said claim during any of the depression years covered by the exemption statutes and no suspension notices whatever were filed for the subsequent years while the suspension was in effect, or until the fiscal year July 1st, 1939, to July 1st, 1940. During such fiscal year from July 1st, 1939, to July 1st, 1940, a proof of labor was filed claim-

ing certain work alleged to have been performed by Messrs. Sutherland and Radovitch. Such work was not in fact proper assessment work because at the time the same was performed, said Sutherland and Radovitch were acting not under contract with or as the agents or employees of the plaintiff, but rather on their own behalf as adverse locators and performed the work claimed in support of an adverse location thereon, their rights under which were subsequently purchased by the plaintiff.

V.

That on July 31, 1941, and while the ground in question was still a part of the public domain, and was unoccupied and unclaimed mineral land (the said purported location of the Snow Shoe Fraction, if it in fact undertook to cover the same or any part [14] thereof being void from its inception, as aforesaid, and the boundaries thereof having been changed repeatedly without any authority whatsoever as above stated so that the ground now claimed thereunder is entirely different from and bears no relation to the original location, and the location having further been rendered void by failure to perform the annual labor during the years above mentioned, and the ground subject to re-location as a result) the defendant's predecessor in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, and the rules and regulations prescribed by the Land Department of the United States and the local customs, regulations and customs of miners, located the Saturn placer mining claim mentioned and described in

said mineral survey No. 2015 referred to in paragraph V of plaintiff's complaint, and thereupon the defendant's predecessor in interest became, and ever since said time the defendant and her predecessor in interest have been, and defendant now is, the owner, subject only to the paramount title of the United States, and has been and now is in possession of said mining ground so covered by said Saturn claim. That in like manner, on October 29, 1941, and while said ground so covered thereby was still vacant and unoccupied, as aforesaid, the defendant's predecessors in interest by virtue of like compliance located the Scorpion Association and Jupiter Association placer mining claims, likewise included in and described in said mineral survey No. 2105, and thereupon became and were, and ever since said time, the defendant and her said predecessors in interest have been and now are the owners, subject only to title paramount in the United States, and have been and now are in possession of the said Scorpion Association and Jupiter Association placer mining claims and of the ground covered thereby also. The ground now claimed under the said Snow Shoe Fraction is, as aforesaid, a small triangular fraction of less than two acres in the northeast corner of the Scorpion Association. [15]

VI.

That such locations are prior, valid and subsisting locations and are covered by the application for patent mentioned in paragraph V of plaintiff's complaint, which is now regularly pending

in the United States Land Office and upon which publication has been regularly completed. That this defendant is a citizen of the United States and in all respects competent and qualified to apply for patent to said mining claims and that by virtue of the premises the defendant has and claims the right to occupy and possess the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and the mineral land embraced therein, and defendant is now in possession thereof and is entitled to the possession thereof.

Wherefore, defendant prays judgment as follows:

1. That plaintiff take nothing by its complaint on file herein.

2. That defendant be declared to be the owner and entitled to the possession of the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and that plaintiff has no right, title or interest in and to the said placer mining claims, or either thereof, or any portion of the ground covered thereby.

3. For defendant's costs and disbursements herein incurred.

4. For such other and further relief as the Court may find meet and equitable in the premises.

/s/ EMMA GRACE LOWE,

Defendant in Proper Person.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Title of District Court and Cause No. 5494.]

ANSWER OF DEFENDANT

Comes now the defendant, appearing in proper person, and for answer to plaintiffs' complaint in support of adverse claim on file herein, admits, denies and alleges as follows:

FIRST DEFENSE—ADMISSIONS AND DENIALS

I.

Admits the allegations of paragraphs I and II of plaintiffs' complaint.

II.

Admits that prior to March 20, 1908, the land therein described, (if and to the extent it is in conflict with the mining claims of the defendant herein-aftermentioned) was a part of the public domain and was unoccupied and unclaimed mineral land, and denies the remaining allegations of paragraph III of said complaint, and specifically denies that the attempted location of the so-called L Association claim was of any force, effect or validity.

III.

Denies the allegations of paragraph IV of said complaint.

IV.

Admits the allegations of paragraph V of said complaint, excepting any inference of invalidity

from the use of the word "purported" in connection with defendant's locations, and in that regard alleges that as hereinafter alleged this defendant's claims are in all respects good, valid and subsisting locations.

V.

Admits paragraph VI of said complaint.

VI.

Admits that this defendant claims an estate and interest in the ground alleged to be covered by the said L Association placer mining claim, if and to the extent the same conflicts with her said Jupiter Association, Scorpion Association, and Saturn claims, and denies the allegations of said paragraph, except as admitted.

SECOND DEFENSE (AFFIRMATIVE
MATTER)

And for a second and affirmative defense to the allegations of plaintiffs' said complaint, defendant alleges as follows:

I.

That on and prior to March 20, 1908, the ground covered by the plat and survey of the Scorpion Association, Jupiter Association and Saturn placer mining claim, being mineral survey No. 2105, referred to in paragraph V of plaintiffs' complaint, was vacant, un-appropriated mineral land. That on

said date, eight individuals who plaintiffs claim as their predecessors in interest, apparently sought to locate the so-called L Association claim upon a portion of the same, or some other lands in that locality. That the said attempted location of the L Association claim was wholly insufficient, illegal and void, and did not comply with the laws of the United States, or the Territory of Alaska, or the rules and regulations prescribed by the Land Department of the United States, or the local rules, regulations and customs of miners then in force and effect in that district, in that, among other other things, the boundaries of said purported claim were not marked so that the same could be traced, readily or at all, and the purported location notice alleged to have been posted upon said claim and thereafter and on June 11, 1908, recorded in Volume 10, Records of Locations at page 113, did not contain such a description of the claim located by reference to some natural object or permanent monument as would identify the [18] claim, but on the contrary the said location notice was in words and figures as follows:

“NOTICE OF LOCATION

Notice is hereby given that the undersigned has located 160 acres of placer mining ground situated in Fairbanks Mining District of Alaska on Fish Creek, tributary of Little Chena, to be known as

the L Association, described as follows, to-wit: Opposite the mouth of Bear and Fairbanks Creek.

Gold discovered—190—.

Located March 20, 1908.

J. P. Hogan,	J. T. McGillevray,
W. H. Passage,	John Lappi,
E. A. Mitchell,	W. E. Sullivan,
D. van Woerdan,	John McCandlish,

By John McCandlish, their agent.”

That said description was wholly insufficient to identify the said ground sought to be covered thereby or to enable any third party to locate the claim or the dimensions or boundaries thereof. No amendment of said claim was made or attempted until long after the defendant's rights had attached and become vested through the filing of the locations upon the Scorpion Association, Jupiter Association and Saturn claims hereafter referred to and her patent proceedings had been commenced.

II.

That plaintiffs' predecessors did not do the annual assessment work required by law upon the so-called L Association claim, during each year following the date of such alleged location, but on the contrary during many of such years they wholly failed to perform such work or otherwise protect the said

location. Among other defaults defendant directs attention to the following:

(a) No labor or improvements whatever were performed or made nor was any affidavit of labor filed for any year prior to the year 1917. During the years 1917 and 1918, while the moratorium during the first world war was in effect, no assessment work was done but in 1917 a suspension notice was filed by the plaintiff, Soderblom, as agent for his associates, and in 1919 one W. E. Sullivan filed for the year 1918 for himself alone, which suspension would if anything apply to his individual undivided interest and would not in [19] any way protect the interests of his co-owners. No annual assessment work was done or proof of labor filed for any year from 1919 to July 1st, 1922; for the fiscal year July 1st, 1922 to July 1st, 1923, the annual labor was done and proof of labor properly filed. Thereafter no labor or improvements was performed or made and no proof of labor filed until the suspension statutes came into force during the depression years. In 1933 a suspension notice was filed covering the fiscal year July 1, 1932 to July 1, 1933, by Messrs. Hogan, Mitchell, Hess, Sullivan, McCandlish and Gibbs and Jensen, claiming as the owners of said L Association claim. In the ensuing year 1933-34, a suspension notice was filed by the first five above mentioned only, which would have been effective to cover only their interests in the claim in any event, and in addition to which certain of said claimants Messrs. Hess and McCandlish had already claimed suspension upon the maximum amount of acreage allowed

to them under the 1934 suspension act. No labor was performed or improvements made upon the claim during any of the depression years covered by the exemption statute and no suspension notices whatever were filed for the subsequent years while the suspension was in effect, or until the fiscal year July 1st, 1939, to July 1st, 1940. During the fiscal year from July 1st, 1939, to July 1st, 1940, a proof of labor was filed claiming certain work alleged to have been performed by Sutherland and Radovitch. Such work was not in fact proper assessment work because at the time the same was performed, said Sutherland and Radovitch were acting not under contract with or as the agents or employees of the plaintiffs, but rather on their own behalf as adverse locator and performed the work claimed in support of an adverse location thereon, their rights under which were subsequently purchased by the plaintiffs. [20]

III.

That on July 31st, 1941, and while the ground in question was still a part of the public domain and was unoccupied and unclaimed mineral land (the said purported location of the L Association, if it in fact undertook to cover the same, or any part thereof, being void from its inception, as aforesaid, and the location having in any event been rendered void by failure to perform the annual labor during the years above mentioned and the ground subject to relocation) the defendant's predecessor in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules

and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners located the Saturn Placer Mining Claim, mentioned and described in the said Mineral Survey No. 2015, referred to in paragraph V of plaintiffs' complaint, and thereupon the defendant's predecessor in interest became and ever since said time the defendant and her predecessor in interest have been and defendant now is the owner subject only to the paramount title of the United States and has been and now is in possession of said mining ground so covered by said Saturn claim. That in like manner, on October 29, 1941, and while said ground so covered thereby was still vacant and unoccupied, as aforesaid, the defendant's predecessors in interest by virtue of like compliance located the Scorpion Association and Jupiter Association Placer Mining Claims, likewise included in and described in said Mineral Survey No. 2105, and thereupon became and were, and ever since said time the defendant and her said predecessors in interest have been and now are the owner subject only to title paramount in the United States and have been and now are in possession of the said Scorpion Association and Jupiter Association Placer Mining Claims and of the ground covered thereby also. [21]

IV.

That such locations are prior, valid, and subsisting locations and are covered by the application for patent mentioned in paragraph V of plaintiffs' complaint, which is now regularly pending in the United States Land Office and upon which publication has

been regularly completed. That this defendant is a citizen of the United States and in all respects competent and qualified to apply for patent to said mining claims and that by virute of the premises the defendant has and claims the right to occupy and possess the said Scorpion Association, Jupiter Association and Saturn placer mining claims and the mineral land embraced therein and defendant is now in possession thereof,

Wherefore, defendant prays judgment as follows:

(a) That plaintiffs take nothing by their complaint on file herein.

(b) That defendant be declared to be the owner and entitled to the possession of the said Scorpion Association, Jupiter Association and Saturn placer mining claims, and that plaintiffs have no right, title or interest in and to the said placer mining claims, or either thereof, or any portion of the ground covered thereby.

(c) For defendant's costs and disbursements herein incurred.

(d) For such other and further relief as the Court may find meet and equitable in the premises.

/s/ EMMA GRACE LOWE,

Defendant in Proper Person.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed June 24, 1946. [23]

[Title of District Court and Cause No. 5493.]

REPLY OF PLAINTIFF

Now comes the plaintiff above named and for reply to the answer of defendant on file herein, admits, denies, and alleges as follows as to the second defense in said answer:

I.

Replying to the allegations of Paragraph I, denies that plaintiff's predecessors in interest sought to locate the said The Snow Shoe Fraction, and in that respect allege that said The Snow Shoe Fraction was located by plaintiff's predecessors in interest as described in the complaint on file herein and that said location was valid and sufficient under the mining laws and the rules and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners then in force and effect in said district; denies the remaining allegations of said paragraph as to the marking of boundaries and discovery of minerals, and the sufficiency of the description in the location certificate.

II.

Denies the allegations of paragraphs II and III of said second defense. [27]

III.

Denies the allegations of Paragraph IV of said second defense except as to those portions thereof which refer to labor performed or "notices of intention to hold" filed by plaintiff's predecessors in interest which said paragraph recites.

IV.

Denies the allegations of Paragraphs V and VI of said second defense.

As and for a further and separate reply to the allegations contained in said answer, plaintiff alleges that it and its predecessors in interest have been in the uninterrupted, adverse, notorious possession of said The Snow Shoe Fraction and the property embraced therein under color and claim of title for more than seven years next preceding the alleged location of said defendant's claims and her assertion of interest in said real property.

Wherefore, plaintiff prays for relief as asked in its complaint on file herein.

/s/ SOUTHALL R. PFUND,

/s/ CHAS. J. CLASBY,

Attorneys for Plaintiff.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed Nov. 7, 1946.

[28]

[File of District Court and Cause No. 5494.]

REPLY OF PLAINTIFFS

Now come the plaintiffs above named and for reply to the answer of defendant on file herein, admit, deny, and allege as follows as to the second defense in said answer:

I.

Replying to the allegations of paragraph I,

plaintiffs admit that the ground described in said paragraph in so far as the same was a portion of the L Association was vacant, unappropriated mineral land; deny that plaintiff's predecessors in interest sought to locate said L Association, and in that respect allege that said L Association was located by plaintiffs' predecessors in interest as described in the complaint on file herein and that said location was valid and sufficient under the mining laws; deny the remaining allegations of said paragraph I as to the marking of the boundaries and the sufficiency of the location certificate.

II.

Deny the allegations of paragraph II of said second defense in said answer except as to those portions thereof which refer to labor performed or "notices of intention to hold" which said paragraph recites, but deny the conclusions of said paragraph [30] as drawn therefrom.

III.

Deny the allegations of paragraph III of said second defense in said answer and deny any implication from the portion of said paragraph III which is in parentheses.

IV.

Deny the allegations of paragraph IV of said second defense in said answer.

As and for a further and separate reply to the allegations contained in said answer, plaintiffs allege that they and their predecessors in interest have been in uninterrupted, adverse, notorious possession of said L Association and the property em-

braced therein under color and claim of title for more than seven years next preceding the alleged location of said defendant's claims and her assertion of interest in said real property.

Wherefore, these plaintiffs pray for relief as asked in their complaint on file herein.

/s/ SOUTHALL R. PFUND,

/s/ CHAS. J. CLASBY,

Attorneys for Plaintiffs.

(Acknowledgment of Service attached.)

(Duly Verified.)

[Endorsed]: Filed June 23, 1947.

[31]

In the District Court for the Territory of Alaska,
Fourth Judicial Division

No. 5493

UNITED STATES SMELTING, REFINING &
MINING COMPANY, a Maine Corporation,
Plaintiff,

vs.

EMMA GRACE LOWE,

Defendant,

and

No. 5494

FIRST NATIONAL BANK OF FAIRBANKS,
WALTER JENSEN, and UNITED STATES
SMELTING, REFINING & MINING COM-
PANY, a Maine Corporation,

Plaintiffs,

vs.

EMMA GRACE LOWE,

Defendant.

INSTRUCTIONS TO THE JURY

Members of the Jury: You are instructed:

I.

(A) That, as limited by the issues in these cases, the laws in force in Alaska in 1908 pertaining to the location of a gold placer mining claim upon the open, unclaimed, unoccupied mineral lands constituting the Public Domain of the United States of America in Alaska, required the following mat-

ters to be done in order to make a valid location, to wit:

1. That the locator make a discovery of gold as hereinafter defined, upon the ground included within said location.

2. That the locator should distinctly mark the boundaries of the claim upon the ground so that they could be readily traced.

(B) You are instructed that it is immaterial whether the discovery or the markings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

(C) You are instructed that to constitute a valid discovery of gold sufficient for the basis of a location, a locator must have discovered gold within the boundaries of the claim sought to be located, of such quantity and character and found under circumstances as to justify a man of ordinary prudence, not [32] necessarily a miner, in the further expenditure of his time and money in hope of developing the ground into a paying mine.

(D) The laws of Alaska in force in 1908 did not require the recording of any location certificate or notice. So, in the present case, it is not necessary to consider whether or not the location certificates filed conformed to the requirement of the law with reference to location certificates.

(E) It is conceded by the parties to these actions that in March, 1908, the month in which the Snow Shoe Fraction and the L Association were staked, that the ground included within the boun-

daries of said claims was open, unclaimed, unoccupied mineral lands constituting the Public Domain of the United States of America in Alaska.

(F) The laws in force in Alaska in 1908 did not require an agent to have a written power of attorney or other written authority from his principals in order to authorize him, the agent, to locate a placer mining claim for his principals within the Territory of Alaska. Consequently, the fact that there is no evidence in this case of any power of attorney or other written authority from the persons named as locators in the certificates of location introduced in evidence in this case in favor of John McCandlish, becomes immaterial.

(G) Under the pleadings the facts proved in this case and the law pertaining thereto, it is not necessary that the plaintiffs should prove any authority to John McCandlish from the persons named as locators of the L Association in the certificate of location in evidence in this case, in order to make the location of the L Association valid, as such authority is presumed by the law.

(H) Under the evidence in this case and the issues as made up by the pleadings, it is immaterial that the L Association contained within its boundaries as originally marked acreage in excess of 20 acres for each locator. [33]

II.

(A) In regard to the location of the Snow Shoe Fraction, you are instructed that the burden of proof is upon the plaintiff to prove by a preponderance of the evidence in this case that its predeces-

sor in interest, W. E. Sullivan, made a valid location of such claim in 1908. If the evidence is equally divided as to such location being a valid one, or if the evidence preponderates against such location being a valid one, you should find that said location was invalid. If the preponderance of the evidence in this case shows that said Sullivan, during the calendar year of 1908, did make a valid location of said Snow Shoe Fraction, you should find that said location was a valid one.

(B) In regard to the location of the L Association, you are instructed that the burden of proof is upon the plaintiffs in Cause Number 5494 to prove by a preponderance of the evidence in this case that the locators or their agent thereof as named in the location certificate in evidence in this case, made a valid location. If the evidence is equally divided as to such location being a valid one, or if the evidence preponderates against such location being a valid one, you should find the location invalid. If the preponderance of the evidence in this case shows that said locators, during the calendar year of 1908, did make a valid location of said L Association, you should find the location valid.

III.

(A) The laws pertaining to annual labor upon the Snow Shoe Fraction and the L Association require that \$100 worth of work or improvements be done upon or for the benefit of each said claim for each annual labor year, except in those years in which such law was suspended as to annual labor.

(B) You are instructed that the law does not prescribe the particular kind of labor which is to be performed upon a mining claim, nor in what it shall consist, nor the manner in which it shall be performed. Nor does the law require that it shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. And you are [34] therefore instructed that any labor performed upon a claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine.

(C) The law presumes that when a person has made a valid location of a placer mining claim, he, the locator, will do the annual labor required by law to keep the claim alive. This presumption continues until it is shown by competent evidence that such annual labor was in fact not done.

In this case the defendant, Emma Grace Lowe, has alleged in her answer that during certain annual labor years, the annual labor required by law was not performed upon the claims in controversy herein. The burden of proof is upon said Emma Grace Lowe to prove such allegations, to-wit: to prove by a preponderance of the evidence that the annual labor was not done upon one or both of said claims for at least one annual labor year. If there is no evidence as to the annual labor not being done for any annual labor year, you should presume that the work was done and so find. If there is evidence that the annual labor work was not done upon either of said claims for any annual labor year, and if such evidence is equally divided

or preponderates to the effect that such annual labor was done, you should find that such annual labor was done. If, on the other hand, the preponderance of the evidence shows that such annual labor was not done, you should so find.

IV.

(A) The annual labor years designated by law were as follows: for 1909 up to and including 1919, the calendar years were the annual labor years; for the annual labor year 1920, the period was from January 1, 1920, to and including the first day of July, 1921; for the annual labor year of 1921, the period from July 2, 1921 to noon, July 1, 1922, was designated; thereafter, each annual labor year commenced at noon, July 1. For the annual labor year beginning July 1, 1938, the law provided that work during the annual labor year or work commenced in good faith before noon, September 1, 1939, and prosecuted with reasonable diligence to completion, should be sufficient for the annual labor year of 1938. [35]

Consequently, if you designate work as being done or not being done for a designated annual labor year, it shall be deemed to be that year or the extension thereof as above mentioned.

V.

You are further instructed:

That in order to constitute legal annual labor for a placer mining claim, it is not necessary that the work or improvements necessarily be upon the claim itself, for it is the policy of the law to encourage the doing of annual labor in a manner

which will best develop the property, and is most likely to result in the production of precious minerals. The work may be done outside a claim or group of claims, provided such work is done in an honest effort to make a paying mine and in a manner tending to develop the claim or all of the claims for which the improvement is made. The courts have uniformly held that annual labor may be done outside of the claim or group of claims, and the universal rule is that proof may be offered that such work was done for the purpose of developing the claim, and that it tends to develop it, and when that is shown and that the value of such development work to the claim benefited is \$100, it is sufficient to comply with the requirements for annual labor.

In this case there was testimony introduced as to the construction of a ditch in the annual labor year commencing July 1, 1939, for the benefit and development of the L Association and seven other claims. As this ditch was alleged to be for the benefit of the L Association and was outside the boundaries of said claim, the burden of showing that it was in fact for the benefit of that claim is upon the plaintiff. If, considering all of the evidence in the case, you believe plaintiff has established by a preponderance of the evidence that said ditch was in fact for the benefit and development of said L Association in that it facilitated the working of the same and of other claims for which the ditch was designed, and the amount [36] constituting the reasonable value of said ditch was

such that it amounted to at least \$100 for each claim alleged to have been benefited and improved by the ditch, you will be justified in finding that it was sufficient annual labor for said year.

VI.

You are instructed that you need not consider whether or not annual labor was done by the plaintiff or their predecessors in interest for the calendar year of 1919 and the annual labor year commencing at noon, July 1, 1933, upon said Snow Shoe Fraction and L Association, as sufficient intentions to hold without annual labor have been filed as to said claims.

VII.

You are instructed that when a valid location of a placer mining claim is once made it vests in the locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon.

VIII.

(a) If you find that the locators of the L Association made a valid location of it, and that they and their successors successors in interest did not fail to do the annual labor required by law for said claim for any annual labor year between January 1, 1909 and noon of July 1, 1940 (except the calendar year of 1919 and the year commencing noon, July 1, 1933) on said claim, it will not be

necessary for you to consider the matters set forth in Instruction Number IX as to whether or not valid locations were made of the Scorpion Association, Jupiter Association and Saturn Claim.

(b) If you find that the said L Association was not validly located, or that, if validly located, the owners thereof failed to do the assessment work for any annual labor year (except the calendar year of 1919 and the year commencing noon, July 1, 1933) in the period between January 1, 1909 and noon, July 1, 1940, the ground included therein would have been open, unoccupied, unclaimed mineral [37] lands of the United States, constituting the public domain in Alaska in 1941, and you should consider the matters set forth in Instruction Number IX hereinafter set forth as to the validity of the locations of the Scorpion Association, Jupiter Association and Saturn Claim.

IX.

The defendant, Emma Grace Lowe, in this action claims under locations made in 1941. The law in force in Alaska in the year 1941 requires for a valid location of placer mining claims as follows:

(a) That the locator of a placer mining claim must make a discovery of gold within the boundaries thereof, such discovery to be as hereinbefore mentioned in Instruction I-C.

(b) You are instructed that it is immaterial whether the discovery or the markings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

(c) "Sec. 356. Notice of location of placer claim;

boundaries. The discoverer of a placer claim shall designate the location as follows:

1. By posting on one of the posts or monuments marking the boundaries of the claim a plain sign or notice containing:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The date of the location;
- (d) The number in feet in length and width claimed; and

2. By erecting at each corner or angle of the claim substantial monuments or posts not less than three feet in height nor less than three inches in diameter, hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines and by cutting out, blazing or marking the boundary lines so that they can be readily traced.”

“Sec. 357. Recording certificate of location. The locator or locators of any lode or placer claim shall, within ninety days after the date of posting the notice of location on the claim, cause such [38] claim to be recorded by filing with the recorder of the recording district in which the claim is located, a certificate of location which shall contain:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The number of feet in length and width of the claim;
- (d) The date of discovering and of posting the notice of location;

(e) A description of the claim with such reference to some natural object or permanent monu-

ment that an intelligent person, with a knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the certificate of location within ninety days as herein provided shall constitute an abandonment of the claim and the ground shall be open to location; provided, however, that full compliance with the provisions of this section after the ninety day period has elapsed, but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator.”

I instruct you that in order to establish a valid location of the Scorpion, Saturn and Jupiter claims, or either of them, the defendant, Emma Grace Lowe, for her principal, Evelyn Mahan, must prove by a preponderance of the evidence that she made a substantial performance of each step of location as above set forth.

If the defendant proves a valid location of either of said claims by a preponderance of the evidence, you should so find. On the other hand, if the evidence in the case proves there was no valid location of either of said claims by said defendant, or if the evidence as to the same is equally divided, you should find that such claim or claims was not validly located.

X.

(a) You are instructed that the law of Alaska, during the time involved in the matters in controversy in these cases, permitted, but did not require the filing of affidavits of annual labor, and that therefore you should not consider a failure to file

an affidavit of annual labor as being any evidence that such annual labor was not performed. [39]

(b) The law of Alaska above-mentioned, makes an affidavit of annual labor which has been filed within three months of the end of the annual labor year prima facie evidence of the performance of the work therein stated, but if other evidence is introduced on the subject of annual labor or its value for the year covered by the affidavit, you should consider the affidavit and such other evidence and try to arrive at the truth of the matter and find in accordance with the preponderance of the evidence on that subject.

You are instructed that the laws of the Territory of Alaska lay down the following general rules for your guidance as to the value of evidence, to wit:

1. That your power of judging the effect of evidence is not arbitrary, but to be exercised with legal discretion and in subordination to the rules of evidence.

2. That you are not bound to find in conformity with the declarations of any number of witnesses which do not produce conviction in your minds against a less number, or against a presumption or other evidence satisfying to your minds.

3. That a witness wilfully false in one part of his testimony may be distrusted in others.

4. That when the evidence is contradictory, the finding shall be in accordance with the preponderance of the evidence.

5. That evidence is to be estimated not only by its own intrinsic weight, but also according to the evidence which it is in the power of one side to

produce and of the other to contradict; and, therefore,

6. That if the weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory evidence was within the power of the party, the evidence offered should be viewed with distrust.

7. That oral admissions of a party should be viewed with caution. Except where the court declares the evidence to be conclusive, you, members of the jury, are the judges of the value of all of the evidence [40] admitted in the case. However, your power of judging the effect of evidence is not arbitrary, but must be exercised with legal discretion and in subordination to the rules of evidence as administered by and given to you by the court in its instructions.

You should not permit the remarks or expressions of opinion by the attorneys in the case to influence your judgment unless the same are in conformity with the evidence or are logical deductions therefrom.

Your duty is to determine the facts of the case from the evidence submitted in conformity with the instructions of the court.

It is the duty of the judge of this court to instruct you as to the law involved in this case and it is your duty, as jurors, to accept as law and to follow the same, whatever is laid down to you as the law of the case by the judge of this court.

You are instructed as follows:

1. That by "preponderance of evidence" is meant the amount of evidence which taken on the

whole produces the stronger impression upon the minds of the jury and convinces them of its truth when weighed against the evidence in opposition thereto.

2. That you should not consider any evidence sought to be introduced, but excluded by the court, nor should you consider any evidence that has been stricken from the record by the court.

3. That it is manifestly impossible for the court to cover the law of this case in a few instructions and that, therefore, you should consider all the instructions together and not disconnectedly.

4. That you should endeavor to agree upon a verdict and should calmly reason with your fellows with the view of arriving at a verdict. You should not refuse to agree from pride of opinion, nor should you surrender any conscientious views founded on the evidence or lack of evidence.

Pursuant to the foregoing instructions I have prepared a form of verdict with blanks for you to fill in, for you to take into your jury room. You should elect a foreman or forewoman who should sign the verdict upon which you unanimously agree. [41]

Herewith I hand you these instructions, the verdict above-mentioned, the pleadings in the case, and the exhibits, that have been introduced in evidence. Return all of these into court with your verdict.

Dated at Fairbanks, Alaska, this 14th day of August, 1947.

/s/ HARRY E. PRATT,

District Judge.

[Endorsed]: Filed Aug. 14, 1947.

[42]

[Title of District Court and Causes Nos. 5493-94.]

VERDICT

We, the Jury, duly empaneled and sworn to try the above-entitled cases in an advisory capacity to the Court, do hereby find and make the following answers to the following questions, to wit:

1. Q. Did W. E. Sullivan, in 1909, make a valid location of the Snow Shoe Fraction?

A. Yes.

2. Q. During any annual labor year (except the calendar year of 1919 and the year commencing noon, July 1, 1933) did the owner or owners of the Snow Shoe Fraction fail to do the annual labor upon the said Snow Shoe Fraction?

A. No.

3. If you have answered the immediately preceding question "yes", then designate what annual labor year or years the owners of the Snow Shoe Fraction failed to do the annual labor upon it. A.

4. Q. Did the locators of the L Association in 1909 make a valid location of that Association?

A. Yes.

5. Q. During any annual labor year (except the calendar year 1919 and the year commencing noon, July 1, 1933), did the owners of the said L Association fail to do the annual labor upon or for the benefit and development of the same? A. No.

6. Q. If you have answered the last preceding question "yes", [43] then designate the annual labor year or years in which the owners of said L Association failed to do the annual labor upon it.

A.

The following questions are not to be propounded or answered unless you find that the L Association was not validly located, or that the annual labor required by law was not done upon or for the development of the L Association during the period above-mentioned in question Number 5.

7. Q. In 1941 did the defendant, Emma Grace Lowe, for her principal, Evelyn Mahan, individually as to the Saturn Claim, and individually and with a power of attorney from Evelyn Mahan as to the Jupiter Association and the Scorpion Association, make a valid location of all three of said claims? A.

8. Q. If you have answered the last preceding question "no", then designate which of said claims were not validly located. A.

/s/ C. L. LINDBERG,
Foreman or Forewoman.

Entered in Court Journal August 14, 1947. No. 35, Page 175-176.

[Endorsed]: Filed Aug. 14, 1947. [44]

[Title of District Court and Causes Nos. 5493-94.]

MOTION

Comes now the above named Defendant and files this, her Motion, in each of the above entitled causes of action and moves the court to render judgment for the Defendant, dismissing Plaintiffs' purported cause of action and to render judgment

for the Defendant in each of the above mentioned cases, and for grounds of said motion states:

I.

That the Plaintiffs have failed to prove the allegations of their complaint and the allegations of the Adverse Claim filed.

II.

That the Plaintiffs have failed to prove a location on either the "L" Association or the Snow Shoe Fraction as by law required.

III.

That the Plaintiffs have failed to prove the marking of the Snow Shoe Claim or the "L" Association on the ground as required by the laws of the Territory of Alaska in 1908.

IV.

That the Plaintiffs, by their own evidence, have proven no annual labor for many years between the attempted staking of the claims and the filing of the Defendant herein on each of said claims.

V.

That the Plaintiffs have failed to prove that they, or either of them were in the possession of the Snow Shoe Fraction or the "L" Association at the time of the filing of the Adverse Claim referred to in the Complaint, or at the time of the filing of the Complaints in the above mentioned causes.

VI.

That the Plaintiffs failed to file the Affidavits of Labor or Notices to Hold or to perform any labor on each of the claims for many years be-

tween 1908 and 1941, at the time the Defendant staked the claims.

For all of which, Defendant moves the court for an order dismissing Plaintiffs' causes of action and to render judgment for Defendant on her Answer filed herein.

BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 14, 1947. [51]

[Title of District Court and Cause No. 5493.]

MOTION FOR JUDGMENT NON
OBSTANTE VEREDICTO

Comes now the Defendant and moves the court to return judgment in the above entitled cause Non Obstante Veredicto, and for grounds of said motion states:

I.

That the verdict rendered by the jury in this case is contrary to the clear weight of evidence, is not supported by any adequate evidence. In many instances there is no affidavit of labor being performed, or notices of claim of exemptions and intentions to hold, and no evidence of labor performed for many years between 1908 and 1946.

II.

That the Plaintiff never did prove possession, which is a requirement in an action to quiet title.

III.

That the rulings of the court prohibited the defendant from introducing competent evidence that would have caused the jury to render a different verdict if the evidence had been introduced.

IV.

That the court permitted incompetent, irrelevant, immaterial and prejudicial evidence to be introduced over the objection of the Defendant.

V.

That there is no competent evidence to establish location of the claim involved herein.

VI.

There is no evidence whatsoever to the effect that the labor performed, if any, was for the benefit of the claim involved.

VII.

That the court refused to instruct the jury at all on the contents of the Act of [52] 1907, which Act was in full force and effect at all times involved herein.

VIII.

That the court refused and neglected to instruct the jury on the law in effect from 1912 until 1934 which law is often referred to as The Wickersham Act.

IX.

The court erred in refusing to sustain the Defendant's Motion for dismissal of Plaintiff's cause of Action and to render judgment for the Defen-

dant at the close of all of the evidence and before the case was submitted to the jury.

For all of which, Defendant moves for judgment Non Obstante Veredicto.

EMMA GRACE LOWE,
Defendant.

By BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 15, 1947. [53]

[Title of District Court and Cause No. 5494.]

MOTION FOR JUDGMENT NON
OBSTANTE VEREDICTO

Comes now the Defendant and moves the court to return judgment in the above entitled cause Non Obstante Veredicto, and for grounds of said motion states:

I.

That the verdict rendered by the jury in this case is contrary to the clear weight of evidence, is not supported by any adequate evidence. In many instances there is no affidavit of labor being performed, or notices of claim of exemptions and intentions to hold, and no evidence of labor performed for many years between 1908 and 1946.

II.

That the Plaintiff never did prove possession, which is a requirement in an action to quiet title.

III.

That the rulings of the court prohibited the defendant from introducing competent evidence that would have caused the jury to have rendered a different verdict if the evidence had been introduced.

IV.

That the court permitted incompetent, irrelevant, immaterial and prejudicial evidence to be introduced over the objection of the Defendant.

V.

That there is no competent evidence to establish location of the claim involved herein.

VI.

There is no evidence whatsoever to the effect that the labor performed, if any, was for the benefit of the claim involved. [54]

VII.

That the court refused to instruct the jury at all on the contents of the Act of 1907, which Act was in full force and effect at all times involved herein.

VIII.

That the court refused and neglected to instruct the jury on the law in effect from 1912 until 1934 which law is often referred to as The Wickersham Act.

IX.

The court erred in refusing to sustain the Defendant's Motion for dismissal of Plaintiff's cause

of Action and to render judgment for the Defendant at the close of all of the evidence and before the case was submitted to the jury.

For all of which, Defendant moves for judgment Non Obstante Veredicto.

EMMA GRACE LOWE,
Defendant.

By BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed Aug. 15, 1947. [55]

[Title of District Court and Causes Nos. 5493-94.]

FINDINGS OF FACT AND CONSLUSIONS
OF LAW

The above entitled actions to quiet title having heretofore been consolidated for purposes of trial and judgment by order of this court duly and regularly given and made pursuant to stipulation of the parties, came on regularly for trial on the 6th day of August, 1947, and succeeding days, before the Honorable Harry E. Pratt, Judge of the above-entitled court sitting with an advisory jury, Southall R. Pfund, Esq., and Charles J. Clasby, Esq., appearing for the plaintiffs, and Bailey E. Bell, Esq., appearing for the defendant, and evidence, both oral and documentary, having been introduced in behalf of the respective parties hereto, and the jury having been duly and regularly in-

structed, and the causes having been submitted to it, the jury having rendered its advisory verdict, in favor of the Plaintiffs and against the defendant, and the causes having been finally submitted to the Court for decision on the 15th day of August, 1947, the court having considered the evidence, the arguments and briefs of counsel and the advisory verdict of the jury, and being fully advised in the [56] premises, now confirms as correct and adopts the findings of fact of the advisory jury in its verdict herein and makes and files herein its findings of fact and conclusions of law, as follows:

FINDINGS OF FACT

I.

Plaintiff, Gustaf Soderblom during his lifetime was, and plaintiffs Walter Jensen and United States Smelting Refining and Mining Company were at all times mentioned herein and now are citizens of the United States of America.

II.

Plaintiff United States Smelting Refining and Mining Company is a corporation organized and existing under and by virtue of the laws of the State of Maine, and is duly qualified to do business within the Territory of Alaska, and has paid its annual corporation tax last due and has filed its annual report for the last calendar year.

III.

Prior to March 20, 1908, the property, hereinafter described and referred to as the Snow Shoe Fraction and L Association, was a part of the public domain and was unoccupied and unclaimed

mineral land. On said date plaintiffs' predecessors in interest by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States, and by the local rules, regulations and customs of minors, made a valid location of a gold placer mining claim commonly known as "The Snow Shoe Fraction," situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks recording precinct, Territory of Alaska, which said claim was more particularly described as follows:

A fraction of 10 acres of placer mining ground, more or less, situated below the mouth of Fairbanks Creek, 350 feet by 1500 feet off the L Association on the Left Limit, the location certificate of which was recorded in Volume 10 of Location Records, at page 113 thereof, as Instrument No. 23502. [57]

Thereafter plaintiff United States Smelting Refining and Mining Company as the owner of said The Snow Shoe Fraction and of the claims adjoining it on the north and west, included a portion of said The Snow Shoe Fraction in said adjoining claims, and said adjoining claims were included in United States Mineral Surveys No. 1690 and No. 1696, and after proceedings duly and regularly had and taken, the United States issued its patent deed covering said claims. The remainder of said The Snow Shoe Fraction as the same existed at the time of the commencement of this action was and is as

shown on Mineral Survey No. 2153, Plaintiffs' Exhibit No. K, herein, and is described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north $24^{\circ} 33'$ west, 7112.24 feet; thence south $50^{\circ} 26'$ east 181.90 feet to Cor. No. 2, identical with Cor. No. 8, L Association; thence north $60^{\circ} 07'$ east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south $75^{\circ} 24'$ west along line, Survey No. 1690, Lulloo 360.20 feet to Cor. No. 4, identical with Cor. No. 3, aforesaid Survey No. 1690, Lulloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south $75^{\circ} 06'$ west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

IV.

On said March 20, 1908, plaintiffs' predecessors in interest, by virtue of compliance with the laws of the United States, the Territory of Alaska, the rules and regulations prescribed by the Land Department of the United States and the local rules, regulations and customs of miners, made a valid location of a gold placer mining claim commonly known as "L Association," situated on Fish Creek, a tributary of the Little Chena River, in the Fairbanks Recording Precinct, Territory of Alaska, which said claim was more particularly described, as follows:

Beginning at Corner No. 1, which is situated 1300 feet northeast of the junction of Fairbanks and Fish Creek, and is common with the southwest corner of Frost Claim, M.S. 1690; thence in a southwesterly direction approximately 550 feet to Corner No. 2; thence in a southwesterly direction approximately 1350 feet to Corner No. 3; thence in a northwesterly direction approximately 550 feet to Corner four; thence in a northwesterly direction approximately 1280 feet to Corner No. 5; thence in a southwesterly direction approximately 1450 feet to Corner No. 6; thence in a southeasterly direction approximately 1450 feet to Corner No. 7; thence in a northeasterly direction approximately 660 feet to [58] Corner No. 8; thence in a southeasterly direction approximately 950 feet to Corner No. 9; thence in a northeasterly direction approximately 2100 feet to Corner No. 10; thence in a northeasterly direction approximately 1350 feet to Corner No. 11; thence in a northwesterly direction approximately 1300 feet to Corner No. 1, initial post and place of beginning. Said claim is a creek claim situated below discovery.

Thereafter plaintiffs Gustaf Soderblom, Walter Jensen and United States Smelting Refining and Mining Company amended the location of said L. Association and cast off excess acreage therein, and the description of said claim and the boundaries thereof as so amended is shown on Mineral Survey No. 2153, plaintiffs' Exhibit No. K herein, and is described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below whence Mineral Monument No. 845 bears north $15^{\circ} 55'$ west 5785.57 feet. No other bearing available: thence south $57^{\circ} 00'$ west 1452.40 feet to Cor. No. 2; thence south $37^{\circ} 50'$ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south $35^{\circ} 13'$ east 622 feet; thence north $61^{\circ} 13'$ east 636.10 feet to Cor. No. 4; thence south $37^{\circ} 10'$ east 716.40 feet to Cor. No. 5; thence north $66^{\circ} 15'$ east 3141.40 feet to Cor. No. 6; thence north $25^{\circ} 19'$ west 1321.35 feet to Cor. No. 7; thence south $60^{\circ} 07'$ west 565.30 feet to Cor. No. 8; thence south $60^{\circ} 07'$ west 565.30 feet to Cor. No. 8; thence south $59^{\circ} 07'$ west 1393.80 feet to Cor. No. 9; thence north $52^{\circ} 48'$ west 534.30 feet to Cor. No. 10; thence north $57^{\circ} 17'$ west 622.30 feet along line 3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of beginning.

Ever since March 20, 1908, plaintiffs and their said predecessors in interest have been and were at the time of the filing of the complaints in said actions, and are now the owners and are entitled to the possession, subject only to the paramount title of the United States, of said The Snow Shoe Fraction and said L Association placer mining claims, and were in possession thereof.

During each annual labor year beginning with the year the owner or owners of said The Snow Shoe Fraction and said L Association have performed the annual labor required by law upon each

of said placer mining claims, or have filed valid notices of intention to hold said mining [59] claims without performing said annual labor, pursuant to acts of Congress suspending or waiving such performance in accordance with such acts.

VII.

On July 31, 1941, defendant's predecessor in interest attempted to locate a placer mining claim known as "The Saturn," and on October 29, 1941, defendant's predecessors in interest attempted to locate placer mining claims called the "Scorpion Association" and "Jupiter Association," all of said claims being more particularly described in United States Mineral Survey No. 2105. Said Scorpion Association included within its boundaries the whole of said The Snow Shoe Fraction, as hereinabove last described, and said Saturn Claim and Jupiter Association included a large portion of said L Association as hereinabove last described.

The area in conflict between the claims of the plaintiffs and said The Saturn, Scorpion Association and Jupiter Association of the defendant was not unoccupied and unclaimed mineral land and was not a part of the public domain at the time of defendant's attempted locations, but was the property of Plaintiffs, subject only to the paramount title of the United States.

VIII.

There was no evidence in this case as to the citizenship of the Defendant Emma Grace Lowe.

IX.

That the reasonable sum to be allowed the Plaintiff for attorney's fees herein is the sum of \$500.00.

CONCLUSIONS OF LAW

As conclusions of law from the foregoing facts, the court finds:

1. Plaintiffs, First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased Walter Jensen and United States Smelting Refining and Mining Company are the owners, subject only to the paramount title of the United States, of that certain placer mining claim known as L. Association situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks Precinct, Territory of Alaska, which said claim is more particularly described as follows: [60]

Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below, whence Mineral Monument No. 845 bears north $15^{\circ} 55'$ west 5785.57 feet. No other bearings available; thence south $57^{\circ} 00'$ west 1452.40 feet to Cor. No. 2; thence south $37^{\circ} 50'$ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south $35^{\circ} 13'$ east 622 feet; thence north $61^{\circ} 13'$ east 636.10 feet to Cor. No. 4; thence south $37^{\circ} 10'$ east 716.40 feet to Cor. No. 4; thence south $37^{\circ} 10'$ east 716.40 feet to Cor. No. 5; thence north $66^{\circ} 15'$ east 3141.40 feet to Cor. No. 6; thence north $25^{\circ} 19'$ west 1321.35 feet to Cor. No. 7; thence south $60^{\circ} 07'$ west 565.30 feet to Cor. No. 8; thence south $59^{\circ} 07'$ west 1393.80 feet to Cor. No. 9; thence north $52^{\circ} 48'$ west 534.30 feet to Cor. No. 10; thence north $57^{\circ} 17'$ west, 667.0 feet to Cor. No. 11; thence north $57^{\circ} 07'$ west 622.30 feet along line

3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of beginning.

2. Plaintiff United States Smelting Refining and Mining Company is the owner, subject only to the paramount title of the United States, of the certain fraction of land being a placer mining claim known as "The Snow Shoe Fraction," situated on Fish Creek, a tributary of the Little Chena River in the Fairbanks Recording Precinct, Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north $24^{\circ} 33'$ west 7112.24 feet; thence south $50^{\circ} 26'$ east 181.90 feet to Cor. No. 2, identical with Cor. No. 8, L Association; thence north $60^{\circ} 07'$ east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south $75^{\circ} 24'$ west along line, Survey No. 1690, Luloo 360.20 feet to Cor. No. 1690, Luloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south $75^{\circ} 06'$ west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

3. Defendant has no estate or right, title or interest whatever in or to said The Snow Shoe Fraction or said L Association placer mining claims, or the land embraced therein, or any part thereof.

4. Plaintiff United States Smelting Refining and Mining Company is entitled to a judgment quieting its title to said The Snow Shoe Fraction placer mining claim against the defendant, and is entitled to the sole and executive possession thereof, and said plaintiffs, First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased, Walter Jensen, and United States Smelting Refining and Mining Company, are entitled to a judgment quieting their title to said L Association placer [61] mining claim against the defendant, and are entitled to the sole and exclusive possession thereof.

5. Said defendant is entitled to take nothing by the answers she has filed herein.

6. Plaintiffs, and each of them, are entitled to their costs of suit incurred herein, including a reasonable attorneys fee, to-wit: the sum of \$500.00.

Let judgment be entered accordingly.

Dated this 1st day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 1, 1948. No. 36,
Pages 185-188.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 1, 1948. [62]

In the United States District Court for the Territory of Alaska, Fourth Judicial Division

No. 5493

UNITED STATES SMELTING REFINING &
MINING COMPANY, a Maine Corporation,
Plaintiff,

vs.

EMMA GRACE LOWE,

Defendant.

No. 5494

GUSTAF SODERBLOM, WALTER JENSEN
and UNITED STATES SMELTING REFINING & MINING COMPANY, a Maine Corporation,

Plaintiffs,

vs.

EMMA GRACE LOWE,

Defendant.

DECREE QUIETING TITLE

The above-entitled actions having been consolidated for purposes of trial and judgment, came on regularly for trial on the 6th day of August, 1947, and succeeding days, before the Honorable Harry E. Pratt, Judge of the above entitled court, sitting with an advisory jury, Southall R. Pfund, Esq., and Charles J. Clasby, Esq., appearing for the plaintiffs, and Bailey E. Bell, Esq., appearing for the defendant, and evidence, both oral and documentary, having been introduced in behalf of the

respective parties hereto, and the causes having been submitted to the advisory jury and the jury having rendered its advisory verdict in favor of the plaintiffs, and against the defendant, and the causes having been finally submitted to the court for decision on the 15th day of August, 1947, [63] upon briefs to be filed by the respective parties, and the court having heard and considered the evidence, the arguments and briefs of counsel and the advisory verdict of the jury, and having fully considered the same and being fully advised in the premises, and having confirmed as correct and adopted the findings of fact of the advisory jury in its verdict herein, and made and filed herein its findings of fact and conclusions of law, and good cause appearing therefor;

Now, therefore, it is Ordered, Adjudged and Decreed as follows:

1. That plaintiff, Gustaf Soderblom, during his lifetime, and First National Bank of Fairbanks, Alaska, executor of the will of Gustaf Soderblom, deceased, thereafter, Walter Jensen and United States Smelting Refining and Mining Company were, during all of the times mentioned herein and in the complaints on file herein, and now are the owners, subject only to the paramount title of the United States, and are entitled to the possession of that certain placer mining claim known as "L Association," and the land embraced therein, situated on Fish Creek, a tributary of Little Chena River, in the Fairbanks Recording Precinct,

Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 4, Survey No. 1696, 19 Below, whence Mineral Monument No. 845 bears north $15^{\circ} 55'$ west 5785.57 feet. No other bearings available; thence south $57^{\circ} 00'$ west 1452.40 feet to Cor. No. 2; thence south $37^{\circ} 50'$ east 1810.10 feet to Cor. No. 3, whence original southwest location corner bears south $35^{\circ} 13'$ east 622 feet; thence north $61^{\circ} 13'$ east 636.10 feet to Cor. No. 4; thence south $37^{\circ} 10'$ east 716.10 feet to Cor. No. 5; thence north $66^{\circ} 15'$ east 3141.40 feet to Cor. No. 6; thence north $25^{\circ} 19'$ west 1321.35 feet to Cor. No. 7; thence south $60^{\circ} 07'$ west 565.30 feet to Cor. No. 8; thence south $59^{\circ} 07'$ west 1393.80 feet to Cor. No. 9; thence north $52^{\circ} 48'$ west 534.30 feet to Cor. No. 10; thence north $57^{\circ} 17'$ west 667.0 feet to Cor. No. 11; thence north $57^{\circ} 07'$ west 622.30 feet along line 3-4, aforesaid, Survey No. 1696, 19 Below, Cor. No. 1 and place of [64] beginning.

2. That plaintiff United States Smelting Refining and Mining Company was during all of the times mentioned herein and in the complaints on file herein, and now is the owner, subject only to the paramount title of the United States, and is entitled to the possession of that certain placer mining claim known as "The Snow Shoe Fraction," and the land embraced therein, situated on Fish Creek, a tributary of Little Chena River, in the Fairbanks Recording Precinct, Territory of Alaska, which said claim is more particularly described as follows:

Beginning at Cor. No. 1, identical with Cor. No. 3, Survey No. 1690, Miller Bench, Cor. No. 3, Survey No. 1696, 21 Below Creek Claim, whence Mineral Monument No. 845 bears north $24^{\circ} 33'$ west, 7112.24 feet; thence south $50^{\circ} 26'$ east 181.90 feet to Cor. 2, identical with Cor. No. 8, L Association; thence north $60^{\circ} 07'$ east along line L Association 565.30 feet to Cor. No. 3, identical with Cor. No. 7, L Association; thence south $75^{\circ} 24'$ west along line, Survey No. 1690, Luloo 360.20 feet to Cor. No. 4, identical with Cor. No. 3, aforesaid, Survey No. 1690, Luloo, Cor. No. 2, aforesaid Survey No. 1690, Miller Bench; thence south $75^{\circ} 06'$ west along line aforesaid, Survey No. 1690, Miller Bench 291.60 feet to Cor. No. 1 and place of beginning.

3. That the claims of the defendant, Emma Grace Lowe, and all who claim title under her in and to said real property, to wit, said The Snow Shoe Fraction and said L Association, are without any right whatever, and said defendant has no right, title, interest, claim or estate whatever in, to, or upon the said placer mining claims, or any part thereof, and said defendant and all persons claiming under her are hereby enjoined and debarred from claiming or asserting any estate, right, title, interest in or claim or lien upon said placer mining claims, or any part thereof.

4. That plaintiffs, and each of them, have and recover from said defendant the costs of suit herein expended and taxed in the sum of.....dollars (\$.....), including [65] a reasonable attorneys'

fee, hereby fixed by the court at five hundred and no/100 dollars (\$500.00).

Dated this 6th day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 6, 1948. No. 36,
Page 199-200.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 6, 1948. [66]

[Title of District Court and Causes Nos. 5493-94.]

NOTICE OF APPEAL

The name and address of Appellant is: Emma Grace Lowe, of Fairbanks, Alaska.

Name and address of Appellant's Attorney is: Bailey E. Bell, of Fairbanks, Alaska.

Name of Appellees are: First National Bank of Fairbanks, Executor of the estate of Gustaf Soderblom, Walter Jensen, and United States Smelting Refining and Mining Company, a Maine corporation.

The address of all the defendants is Fairbanks, Alaska.

The names and addresses of the Attorneys of Record for Appellee are: Southall R. Pfund, F. E. Building, Fairbanks, Alaska, and Charles J. Clasby of the law firm of Collins and Clasby, Fairbanks, Alaska.

The actions as consolidated are adverse suits

to determine the right of possession to mining claims and to quiet title to the properties described in the complaints filed in each of the above-entitled causes.

The actions were and are based upon the general mining laws [67] of the United States as affected by the amendments affecting Alaska and the general laws of Alaska, and especially the construction of Sections 381, 384, and 387 of Title 48, U.S.C.A., and Chapter 297, United States Statutes at Large, 52, being the act of May 31, 1938, that the trial court held repealed by implication, Section 384 of Title 48, U.S.C.A., known as the Wasky Act.

It is contended by the Defendant that the Court erred in overruling her demurrer in cause No. 5493. It is further contended by the Defendant that the court erred in not sustaining her objections to the introduction of any evidence on the part of the Plaintiff in cause No. 5493 and 5494, which motion was made at the commencement of the trial.

The Court erred in not granting the Defendant's motion for a mistrial of this consolidated case for the reason that during a recess two of the jurors were examining the maps of the principal party of this law suit and the Vice President and General Manager of the plaintiff company was up there whispering to them. And for the further reason that we have no knowledge of what this executive officer of the plaintiff company said to the jurors and his statements are not in the record and we had no chance to cross examine. And this is espec-

ially true since the Court stated, T. of R., Page 104:

The Court: I heard everything Mr. Earling said, I am sure, and all it was was to point out very obvious facts that were on the map, which showed where the claims in controversy were, and the jurors and I were trying to find out where they were. He merely pointed out on the map where they were, in an entirely innocuous way. I will deny the motion.

Mr. Bell: Exception.

The Court erred in overruling the Defendant's motion for non-suit in cause No. 5493 and the same motion in cause No. 5494, as shown in Page 147 of the transcript by the Court Reporter. And the Court's ruling thereon was erroneous as is shown in the proceedings commencing on Page 147, and to, and including, Page 156, wherein the Court overruled Defendant's motions and granted the Plaintiff the right to reopen and put [68] in additional evidence.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment for non-suit of Plaintiff's action in Case No. 5493, and denying Defendant any recovery, made at the time Plaintiffs rested their case.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action, and to render judgment for non-suit of Plaintiff's action in Case No. 5494, made at the time the Plaintiffs rested their case, all as shown in the

transcript of testimony and proceedings made by the official Court Reporter, shown on Pages 242, 243, 244, and 245.

Defendant contends that the Court erred in not sustaining her motion for judgment Non Obstante Veredicto filed in said cause immediately following the verdict of the jury, which filing was entered on August 15, 1947.

The Court erred in refusing to give Defendant's offered instructions No. 1, 2, 3, 4, 5, 6, and 7, or any of them.

The Court erred in giving instructions which did not clearly state the law affecting the cases being tried, but were contrary to the law, and the controlling decisions affecting this jurisdiction and these cases.

The Court erred in giving instructions Nos. Subdivision D of Instruction No. 1; Subdivision H of Instruction No. 1 and the whole of Instructions No. 3, 4, 6, 7, 9 and 10 which instructions were specifically objected to and exceptions granted the Defendant thereon.

That the verdict of the jury as rendered was unconscionable, was contrary to all of the evidence, was not supported by any competent evidence, was contrary to the great weight of the evidence.

That the Court rendered judgment in this case on the 6th day of April, 1948, in favor of the Plaintiff and denied the Defendant any recovery whatsoever, which was error on the part of the Court.

On the same day and date, the Court rendered judgment for the Plaintiff and against the Defendant for an attorney's fee without any evidence

whatsoever having been introduced or offered for the purpose of fixing an attorney's fee or the amount thereof. [69]

And that the judgment was error in that it was not based upon any evidence or upon any pleading authorizing the rendering of judgment for an attorney's fee.

I, Grace Lowe, hereby appeal to the United States Circuit Court of Appeals for the Ninth Circuit for the judgment above-mentioned on all of the grounds set forth above, and the following grounds:

I.

The Court erred in not sustaining the Defendant's motion for a non-suit in each of the above causes of action as consolidated.

II.

The Court erred in not instructing the jury to return a verdict for the Defendant in each separate case.

III.

The Court erred in sustaining the Plaintiff's objections to competent questions, thereby preventing the introduction of competent, material and relevant evidence.

IV.

The Court erred in refusing the offers of the Defendant to prove competent, material and relevant facts.

V.

The Court erred in admitting incompetent, irrelevant and immaterial evidence on the part of the

Plaintiff in each of the cases over the objections of the Defendant and thereby prevented the Defendant from having a fair trial.

VI.

The Court erred in giving instructions to the jury which prevented the Defendant from having a fair trial.

VII.

The Court erred in refusing to give the Defendant's offered instructions.

VIII.

The verdict, as returned into Court, was arrived at unlawfully and [70] was based on prejudice and misconduct on the part of certain jurors, was clearly against the great weight of the evidence and was not sustained by any competent evidence.

IX.

Errors of law occurring at the trial on the part of the Court.

X.

Error of the Court in not instructing the jury to render a verdict for the Defendant.

XI.

Error of the Court in not sustaining the Defendant's motion for a non-suit in each of the cases.

XII.

Error of law whereby the Court held that Section 384, Volume 48, U.S.C., Known as the Wasky Act, had been repealed by implication by the Act of 1938, same being Chapter 297, United States Statutes at Large, 52, found on Page 588.

XIII.

Error of the Court in finding and signing Findings of Fact, Numbers 1, 2, 3, 4, 7, 8, and 9.

XIV.

Error of the Court in finding and signing Conclusions of Law, Numbers 1, 2, 3, 4, 5, and 6.

XV.

Error of the Court in rendering judgment in Cause No. 5493 for the Plaintiff and denying the Defendant any recovery.

XVI.

Error of the Court in rendering judgment in Cause No. 5494 in favor of the Plaintiffs and against the Defendant, Emma Grace Lowe, and denying the Defendant any recovery.

XVII.

Error of the Court in rendering judgment for Attorney's fees in favor of the Plaintiff and against the Defendant.

Respectfully submitted,

/s/ EMMA GRACE LOWE,
Defendant.

By /s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948.

[71]

[Title of District Court and Causes Nos. 5493-94.]

PETITION FOR ALLOWANCE OF APPEAL

The above-named Defendant, considering herself aggrieved by the judgment of this Court made and entered herein on the 6th day of April, 1948, and the orders of the Court and the rulings of the Court as set out in the Minutes and the Transcript of the Record and in the Assignment of Errors, said judgment being in favor of the Plaintiff when she believes it should be in her favor, and in the overruling and failing to sustain her motion Non Obstante Veredicto, and for allowing the Plaintiffs an attorneys' fee and judgment for costs.

The Defendant having given due notice of appeal from said judgment to the United States Circuit Court of Appeals for the Ninth Circuit Court of the United States setting in San Francisco, California for all of the reasons specified and set forth in the record in this case and in her Assignment of Errors and the Notice of Appeal filed herein does respectfully pray that said appeal may be allowed and that a transcript of records, proceedings and papers upon which said judgment was based and entered be duly authenticated by the Clerk of this Court and sent to the United States [72] Circuit Court of Appeals for the Ninth Circuit of the United States at San Francisco, California, and that said Defendant does further pray that said judgment afore-mentioned be corrected, set aside, reversed, a new trial ordered, and proper judgment entered for the Defendant herein, and

that the Court fix the amount of Appeal Bond and Supersedeas Bond to be filed herein.

Dated at Fairbanks, Alaska, this 9th day of April, 1948.

/s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948. [73]

[Title of District Court and Causes Nos. 5493-94.]

ASSIGNMENT OF ERRORS

Comes now Emma Grace Lowe, Defendant in each of the above-denominated and consolidated cases, and sole and only Defendant in each of said cases and for Assignment of Errors in this consolidated case alleges and states:

* * * *

[74]

V.

The Court erred in overruling the Defendant's motion for non-suit in Case No. 5493 when the Plaintiff rested.

VI.

The Court erred in granting the Plaintiff the right to reopen their case after they had rested in Case No. 5493.

VII.

The Court erred in overruling Defendant's motion for non-suit in Case No. 5494, as shown on Page 147 of the transcript by the Court Reporter.

VIII.

The Court further erred in permitting the Plaintiffs to reopen their case for the purpose of offering additional evidence after they had rested and after the motion for non-suit had been made.

IX.

The Court erred in overruling Defendant's motion for non-suit at the close of all of the Plaintiffs' evidence after they had reopened and offered some additional evidence that still failed to prove a cause of action in favor of the Plaintiffs and against the Defendant, entitling them to recovery in Case No. 5493.

* * * *

[75]

XI.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment of non-suit of Plaintiff's action in case No. 5493 at the close of all of the evidence.

XII.

The Court erred in not sustaining the Defendant's motion to dismiss Plaintiff's cause of action and to render a judgment granting a non-suit of Plaintiffs' action in case No. 5494.

XIII.

The Court erred in not sustaining Defendant's motion for judgment Non Obstante Veredicto filed in said cause immediately following the verdict of the jury, which motion was filed and entered on August 15, 1947.

XIV.

The Court erred in refusing to give Defendant's offered instructions No. 1, 2, 3, 4, 5, 6 and/or 7, or any of them.

XV.

The Court erred in giving instructions to the jury which did not clearly state the law affecting the cases being tried together, but said instructions were contrary to the law and the controlling decisions affecting this jurisdiction and this case.

XVI.

The Court erred in giving instructions Subdivisions (d) and (h) of No. 1 and the whole of No. 3, 4, 6, 7, 9, and 10, which instructions were specifically objected to on the grounds that they were contrary to the law and did not clearly state the law affecting these cases, and exceptions were granted to the Defendant on each and every one of said instructions.

XVII.

The Court erred in sustaining Plaintiffs' objections to competent, relevant, and material evidence throughout the entire proceedings.

XVIII.

The Court erred in refusing the offers to prove made by the Defendant [83] out of the presence of the jury as are shown in the transcript of records and proceedings had in open Court, filed in this cause and hereby made a part of this Assignment of Errors as fully as if set out herein in full.

XIX.

The Court erred in permitting the introduction of incompetent, irrelevant, immaterial, and prejudicial evidence over the objection of the Defendant, all as is shown by the Court Reporter's transcript filed herein and made a part of this Assignment of Errors as fully as if set out herein in full and attached hereto.

XX.

The Court erred in accepting and being guided by the verdict of the jury as rendered which was unconscionable, was given at a time that the jury was biased and prejudiced against the Defendant, and was contrary to all of the evidence; was not supported by competent evidence; was contrary to the great weight of evidence.

XXI.

That the Court erred in rendering the judgment that he did in this case on the 6th day of April, 1948, in favor of the Plaintiff in both cases and denied the Defendant any recovery whatsoever in either, and that said judgment was not supported by any competent evidence, was contrary to the evidence, and was contrary to the great weight of the evidence.

XXII.

That the judgment rendered as above-mentioned was based upon a wrongful construction of law in which the Court held that the Act of May 31, 1938, by the Congress of the United States, which is found in United States Statutes at Large, 52, and being Chapter 297, repealed Sections 381, 384, and

387 of Title 48, U.S.C.A., and especially 384, which is referred to as the Wasky Act.

XXIII.

The Court further erred in rendering a judgment for the Plaintiff against the Defendant for an attorney's fee without any evidence whatsoever having been introduced or offered for the purpose of fixing an attorney's fee, or as to the services rendered, or what a reasonable fee would be, or to determine [84] the amount thereof, and this is especially true since the pleadings do not ask for attorney's fees and the judgment granting attorney's fees was an error of law and an error of fact.

XXIV.

Errors of law occurring at the trial on the part of the Court, all as shown by the above-mentioned certified transcript of the records and proceedings had in open Court and made by the Court Reporter.

XXV.

Error of the Court in not instructing the jury to render a verdict for the Defendant in Case No. 5493.

XXVI.

Error of the Court in not instructing the jury to render a verdict for the Defendant in Case No. 5494.

XXVII.

Error of the Court in finding and signing the following numbered findings of fact, to-wit: I, II, III, IV, VII, VIII, and IX.

XXVIII.

Error of the Court in finding and signing conclusions of law Numbers 1, 2, 3, 4, 5, and 6.

XXIX.

Error of the Court in rendering judgment in the above-entitled consolidated cases for the Plaintiff and denying the Defendant any recovery.

* * * *

[85]

L.

The Court erred in not sustaining the Defendant's motion for non-suit at the close of the Plaintiff's evidence in Cause No. 5493, Tr. 147.

LI.

The Court erred in not sustaining Defendant's motion for non-suit at the close of all of the evidence as to Cause No. 5494, Tr. 147, to and including 157.

* * * *

[99]

LVII.

The Court erred in the following ruling shown of Page 190, Tr:

Mr. Bell: I started to say to you what my contention was.

The Court: You read that and gave me your position this morning.

Mr. Bell: Well, it is the Statute of Alaska.

The Court: That Statute was repealed. The Waskey Act was repealed in 1938. Also, it didn't apply to a case of this sort. The presumption is that a man works a mining claim continuously. Anyone claiming he didn't do [100] the assessment work has the burden of proving it.

Mr. Bell: I wanted that in the record to show my position that the statute is still valid. Now, your Honor, why I say I have a right to examine even further, even against that ruling on labor, is because he testified to certain labor he had performed out there in chief, yesterday. He testified to sinking three different shafts, and I wanted to know when he sank those shafts and if he ever did any other work there.

The Court: Objection is sustained.

Mr. Bell: Exception.

* * * *

[101]

LXX.

The Court erred in overruling the Defendant's demurrer and motion for non-suit at the close of the Plaintiff's evidence as follows; to-wit:

Mr. Bell: Comes now the Defendant, Grace Lowe, in cause Number 5493, the case affecting the "Snow Shoe Fraction", and moves the Court to make an order to sustain a demurrer to the evidence, and to make an order of non-suit for all of the reasons that I will hereinafter state.

Comes now the Defendant, Grace Lowe, and moves the Court to sustain a demurrer to the evidence in cause Number 5494, and to make an order of non-suit as to the Plaintiffs' cause of action, and for the grounds that the motion states; first, that the Plaintiffs have not, in either case, proven the allegations of their complaint; and the second, they have not proven a valid location of the ground; third, they have not proven the filing of a valid location; fourth, they have not proven pos-

session of the ground; fifth, they have not met the Statute in that it requires the filing of affidavits of annual labor, and since they did not file the affidavits of annual labor, the burden of proof under the Statute is upon them to prove the labor was performed; for the further reason that the attempted amended location that they introduced since the resting of the case and the reopening, is nothing more than a relocation, and to prove a relocation, they had to prove an abandonment of the former locators, and they can not recognize by the instruments the former location, and then relocate in the name of the United States Smelting Refining and Mining Company, who was not a party to the original location; and for the further reason they have failed to establish a cause of action in favor of the Plaintiffs.

* * * *

[104]

C.

The Court erred in the following proceedings:

The Court: This morning there was evidence tendered by Grace Lowe as to years in which no affidavits of annual labor or notices of desire to hold without annual labor had been filed. Over objection, I permitted it to go in, thinking it had some probative value. Upon reflection, I believe I was mistaken, and that it has no probative value. Therefore, I will entertain any appropriate motion.

Mr. Pfund: I move that it be stricken, in conjunction with the motion to strike at the time.

Mr. Bell: I object. It is a question of fact that

it be determined by the Court under the Waskey Act that was in full force and effect all during the years that she testified about. She only testified—nothing beyond '38—1938, from the staking, up to 1938.

The Court: I will sustain the motion, and it is stricken.

Mr. Bell: Exception.

* * * *

[127]

CII.

The Court erred in the following proceedings:

["Note: Then follows the testimony of Mr. Everett E. Smith, which is set out in this assignment in identical form and in exactly the same words as appear in Exception No. 3 in the Bill of Exceptions and hereafter printed. Such material is a duplication of the identical material appearing in Exception No. 3 and for that reason appellant considers its inclusion unnecessary as a part of the printed record."]

* * * *

[128]

CXXI.

The Court erred in admitting Identification No. 26, Exhibit "X".

["Note: Then appears quotations from the testimony showing the offer of this exhibit in evidence, the objection thereto, and the court's ruling thereon in the identical language that appears and is quoted in Exception No. 8, pages 198 and 199 of the transcript of record. Such material is printed as a part of said exception and the same quotations from the testimony which appear in this assign-

ment would be a mere duplication thereof and appellant has not caused it to be printed for such reason.”]

* * * *

[145]

CXXIII.

The Court erred in admitting Identification 27, Exhibit “Y”.

[“Note: Then follows quotations from the transcript of testimony showing the offer of this exhibit, the objection thereto and the court’s ruling thereon and argument of counsel in connection therewith. The same and identical material appears and is quoted in the bill of exceptions, Exception No. 8, which is printed as a part of this record, on page 200, transcript of record. For such reason appellant does not consider it necessary to print the same material here.”]

* * * *

[148]

CXXIV.

The Court erred in admitting Identification “28”.

[“Note: Then follows quotations from the transcript of testimony showing the offer of this identification in evidence, the objection thereto, the argument of counsel in connection therewith, the court’s ruling thereon, and its admission as plaintiff’s Exhibit Z. Such quotations are identical with the quotations appearing in said Exception No. 8 of the Bill of Exceptions and printed in connection therewith, pp. 200 to 202, transcript of record. For such reason appellant has not caused this mat-

ter to be printed, as it is a duplication of the same and identical matter appearing in said exception.”]

* * * *

[149]

CXXIX.

Error of the Court in inserting in Paragraph 8 of the Findings of Fact the following:

“There was no evidence in this case as to the citizenship of the Defendant, Emma Grace Lowe, at any time.” Since this matter was never questioned in the pleadings, the evidence or a suggestion of amendment.

CXXX.

Error of the Court in inserting Paragraph 9 of the Findings of Fact the following:

“That the reasonable sum to be allowed the Plaintiff for attorneys fees herein is the sum of \$500.00.”

CXXXI.

Error of the Court in overruling all of the rest, residue and remainder of the objections of the Defendant to Plaintiffs proposed Findings of Fact and Conclusions of Law.

Wherefore, Defendant prays that said judgment be set aside, reversed, modified, and a correct judgment rendered in accordance with law, and that the Court hold that the so-called Waskey Act referred to in the proceedings has not been repealed by implication and for a judgment applying the prevailing law to the evidence as given and as offered and rejected in this case, and for such other and further relief as the Court may deem just and proper, and for all costs of appeal, including a

reasonable attorney's fee for Defendant's attorneys.

/s/ BAILEY E. BELL,
of Attorneys for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 9, 1948.

[152]

[Title of District Court and Causes Nos. 5493-94.]

ORDER ALLOWING APPEAL AND FIXING
AMOUNT OF APPEAL BOND

Now, on this 10th day of April, 1948, the same being one of the days of the General April, 1947 term of this Court, this cause came on regularly to be heard upon the petition of the Defendant in each of the above-entitled, consolidated cases, Emma Grace Lowe, for the allowance of an appeal in behalf of the said Defendant from the final judgment entered in said cause on the 6th day of April, 1948, and also fixing the amount of appeal bond on said appeal and the place of hearing of said appeal, and the said Court being fully advised in the premises, finds that the amount of the appeal bond should be \$250.00, Now, Therefore,

It Is Hereby Ordered That the appeal of said Defendant from the final judgment entered herein on the 6th day of April, 1948, and all judgments, orders, and rulings as are set forth in the Assignment of Errors filed herein, be, and the same is allowed, to the United States Circuit Court of Appeals for the Ninth Circuit, and that a certified

transcript of the record, proceedings, orders, judgment, testimony, and all other proceedings in said matter on which said judgment appealed from is based, be transferred, duly authenticated, to the United States Circuit Court of Appeals for the Ninth Circuit and therein filed and said cause [153] docketed on or before 60 days from this date, to be heard at San Francisco, California.

It Is Further Ordered That the amount of the appeal bond be, and is hereby, fixed at the sum of \$250.00; said bond to be submitted and approved by the undersigned Judge of this Court.

Done in Chambers at Fairbanks, Alaska, on this 10th day of April, 1948.

/s/ HARRY E. PRATT,
District Judge.

Entered in Court Journal April 9, 1948. No. 36,
Page 208-209.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 10, 1948. [154]

[Title of District Court and Causes Nos. 5493-94.]

BILL OF EXCEPTIONS

Be It Remembered that on the 5th day of August, 1947, at Fairbanks, in the Fourth Judicial Division of the Territory of Alaska, the above entitled causes (which had been consolidated for trial) came on regularly for trial in said District Court, before the Hon. Harry E. Pratt, Judge,

the plaintiffs appearing with their witnesses and by their attorneys Southall F. Pfund and Charles J. Glasby, and the defendant appearing in person and with her witnesses and by her attorney Bailey E. Bell, whereupon an advisory jury was duly selected, impanelled and sworn by direction of the Court to try the said combined cases and the trial of said cases continued from day to day until the 14th day of August, 1947. In connection with said trial the following proceedings were had and taken, to-wit: [155]

EXCEPTION No. 1

That during the trial of said causes and the presentation of plaintiffs' case in chief, plaintiffs introduced no evidence regarding the performance of any annual labor and assessment work, or the filing of any proofs of labor or suspension notices on either of the claims involved herein, the L Association or Snow Shoe Fraction, and the Court denied and refused to permit efforts on the part of the defendant to show that the assessment work was not done and that no proofs of labor or suspension notices were filed during certain years between 1908 and 1938, and excluded certain exhibits offered by the defendant in that regard upon the grounds that such evidence was not proper cross-examination and was matter of affirmative defense, that the Waskey Act had been repealed in 1938; that the presumption now was that a man works a mining claim continuously, (p. 190, Tr. of Testimony), whereupon at the close of plaintiffs' testi-

mony, the following motion was submitted by the defendant:

“Mr. Bell: Comes now the Defendant, Grace Lowe, in cause Number 5493, the case affecting the “Snow Shoe Fraction”, and moves the Court to make an order to sustain a demurrer to the evidence, and to make an order of non-suit for all of the reasons that I will hereinafter state.

“Comes now the Defendant, Grace Lowe, and moves the Court to sustain a demurrer to the evidence in cause Number 5494, and to make an order of non-suit as to the Plaintiffs’ cause of action and for the grounds that (o) the motion states; first, that the Plaintiffs have not, in either case proven the allegations of their complaint; * * * * fifth, they have not met the Statute in that it requires the filing of affidavits of annual labor, and since they did not file the affidavits of annual labor, the burden of proof under the Statute is upon them to prove the labor was performed; * * * * and for the further reason they have failed to establish a cause of action in favor of the Plaintiffs.”

(Mr. Bell then presented his argument and citations on the motion; and Mr. Pfund presented his argument and citations.)

“The Court: I think the law is well established. * * * * But when it comes to showing assessment work, I don’t think they have to. I think the burden of proof of showing it wasn’t done lies upon the person asserting it.

“Now, the Waskey Act said, if you didn’t file

location certificates, the burden should be shifted. There has been a good deal of questioning that, but not—from that point of view—but entirely from the point of view when the [156] Waskey Act was repealed in '38. I take the view that the burden is still on the defendant. Perhaps it is under the General Laws, too, but the Waskey Act being repealed, it certainly is, and I think by this time the Plaintiff has definitely shown claims which conform to the proper pleading in this case, so all told, I deny the motion.

“Mr. Bell: Do you deny it in each?”

“The Court: I deny it in each.

“Mr. Bell: Please let the record show an exception to the defendant.”

(Tr. of Testimony, pp. 242 to 245.)

EXCEPTION No. 2

Following the proceedings recited in Exception No. 1, and during the presentation of defendant's evidence, the defendant Grace Lowe was called as a witness on her own behalf and having been duly sworn was at first permitted to testify over objection of the plaintiffs' counsel that she had examined the records in the office of the United States Commissioner and ex officio recorder of the mining district in which the L Association and the Snow Shoe Fraction claims are situated as of three days before the commencement of the trial, that from 1908 to 1915 there were no affidavits of labor or claims of exemption on file for either claim, and and as regards subsequent years there were no af-

fidavits of labor or intention to hold filed for 1920, 1921, 1925, 1926 and 1927, and the intention to hold for 1917 upon the L Association was filed for by Billy Sullivan alone, or Gus Soderblom, she could not recall which. The witness further testified that she did not believe there was any intention to hold filed for the years 1918 and 1919, and no affidavits of labor for the years 1934 or 1935. After having admitted said testimony on the morning of August 12, when the Court reconvened, at 2 p.m. after the noon recess, the following proceedings were had:

“The Court: This morning there was evidence tendered by Grace Lowe as to years in which no affidavits of annual labor or notices of desire to hold without annual labor had been filed. Over objection, I permitted it to go in, thinking it had some probative value. Upon reflection, I believe I was mistaken, and that it has no probative value. Therefore, I will entertain any appropriate motion. [157]

“Mr. Pfund: I move that it be stricken, in conjunction with the motion to strike at the time.

“Mr. Bell: I object. It is a question of fact that it be determined by the Court under the Waskey Act that was in full force and effect all during the years that she testified about. She only testified—nothing beyond ’38—1938, from the staking, up to 1938.

“The Court: I will sustain the motion, and it is stricken.

“Mr. Bell: Exception.”

(Transcript of Testimony, p. 364.)

EXCEPTION No. 3

That during the trial of said causes, and following the proceedings recited in Exceptions Nos. 1 and 2, there was called as a witness on behalf of the defendant one

EVERETT E. SMITH,

who being duly sworn testified as follows:

“Direct Examination

“Questions by Mr. Bell:

“Q. Now, please state your name? A. Everett E. Smith.

“Q. What, if any, official position do you hold in the Fourth Judicial Division of the Territory of Alaska? A. I am United States Commissioner and ex-officio Recorder.

“Q. And as such, do you have in your custody the books and records showing all mining, all exemptions of labor filed for the year 1938, up to the present time? A. Yes, sir.

“Q. Do you also have in your possession the record of all affidavits of labor filed in this mining district from 1908, up to the present time? A. Yes.

“Q. Have you, at my instance and request, made a search of those records to see what exemption claims and what affidavits are—or affidavits of labor, or notices of exemption claims—have been filed from 1908 up to the present time? Did you make that search? A. My search is not complete, due to lack of time.

(Testimony of Everett E. Smith.)

“Q. How far up is your search? A. At the present time I reached 1928.

“Q. You haven’t been able to come on beyond 1928, then? A. Well, I have brought with me to the courtroom the Index records, and those show all of the work, affidavits of labor from approximately 1914 to date.

“Q. So then, with the work that you have done, and the Index record, you are in a position to tell the Court and jury what affidavits of labor have been filed affecting these two places, and what notices of exemptions have been filed, up to and beyond 1941? With the Index, and your search? A. Well, I believe the record will speak for itself.

“Q. Now, then, would you tell us what the record shows for the ‘Snow Shoe’ claim commencing at 1908, and examine your record or search, and the Index, from then on up [158] to ’41, and tell us what dates affidavits of labor were filed, and what dates notices of intentions to hold were filed? That is on the ‘Snow Shoe’, now. A. I would have to get my record books, because something like that would cover too much from memory.

“Q. Well, do you have your record books here with you? A. Well, I have the Index.

“Q. Can you take the Index and tell the Court and jury what years either of those were filed on the ‘Snow Shoe’? A. Well, affidavits of labor also have your intentions to hold, and you couldn’t tell right from the Index whether it was an intention to hold, or an affidavit of labor.

(Testimony of Everett E. Smith.)

“Q. But you can tell from your Index whether anything was filed for the year? A. Yes.

“Q. Now, then, first we will have you tell us what years they were filed, and then have you check the records to give us what instrument each was. Now, starting on the ‘Snow Shoe’, when was the first record of any filing of either the affidavit of labor, or the intention to hold?

“Mr. Pfund: We object, of course, if your Honor please, on the ground it is not the best evidence. It is incompetent, irrelevant and immaterial.

“The Court: The objection will be overruled.

“A. The first affidavit of labor—or this may be a—it is. We would have to look it up in the volume, itself, to get its correct title, but the first indication we have of anything on the ‘Snow Shoe’ is in 1915.

“Q. 1915? Nothing shown in the record from the date of the filing of the claim, or the mining claim notice, up to 1915, as I understand.

“Mr. Pfund: It is leading and suggestive.

“Mr. Bell: Yes, it is, but I am repeating his statement.

“Q. Is that right? A. As far as I can find out, from my Index.

“Q. Now, then, when is the next filing on the ‘Snow Shoe’? A. That was in 1917.

“Q. 1917? A. And that was a joint intention to hold for the ‘Snow Shoe’ and the ‘L Association’.

“Q. Intention to hold? Now, then, what was

(Testimony of Everett E. Smith.)

next, after 1917, affecting the 'Snow Shoe'? A. Intention to hold in 1918.

"Q. All right. A. for both the 'L' and the 'Snow Shoe'.

"Q. All right. Now, what was the next after that? A. That was in 1919, exemptions from annual labor for both the [159] 'Snow Shoe' and the 'L Association'.

"Q. All right. Then what was the next after that? A. The next after that were two instruments for the assessment year ending July 1, 1923.

"Q. 1923? Did that affect both of them, or was there two instruments there for one? A. No, one was for the 'L Association' and one for the 'Snow Shoe Fraction'.

"Q. One for each? All right, now when was the next? A. That, I believe, is July 1, 1928.

"Q. Nineteen and 28. Now, that is for the 'Snow Shoe Fraction', is it? A. Well, yes, that was for the 'Snow Shoe Fraction'. There was an 'L Association' noted in there, but I don't believe—(interrupted).

Mr. Pfund: Never mind what you believe, please. We object to that testimony, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

"Q. Was there an instrument filed in 1928, in which the 'L Association' was mentioned?

Mr. Pfund: Object on the ground it is leading and suggestive.

The Court: Objection sustained.

(Testimony of Everett E. Smith.)

Mr. Bell: Exception.

“Q. All right, now, was there any more affidavits of labor, or notices of exemption, or anything filed about the ‘Snow Shoe Fraction’, from then on, up—from ’28 on up? A. Yes.

“Q. Please give us the next date? A. The next date was July 1, 1929.

“Q. 1929? A. That is the assessment year ending.

“Q. What was that that was filed? A. In my notes I have ‘Snow Shoe’, but we have these books—I have the volumes.

“Q. Have you the volumes, and can you check them and get us exactly what each one was? A. Yes.

“Q. Would you do that for us, and how long would it take you to do that? A. Well, I could bring the volumes into court.

“Q. Could you bring them up right away? A. Yes.

“Q. All right. A. For all of these that you have mentioned?

“Q. Well, the ones that you have—every one that was filed. Every instrument that was filed, from 1908 up to 1941. [160] Could you do that then, and how long would it take you to do that? It would really save the time of the court if he will check so that he can testify what the instrument was. A. I would probably have to bring about six volumes.

The Court: About how long would it take you.

(Testimony of Everett E. Smith.)

Several hours? A. Oh, no, I could bring them up right away.

The Court: How long? A. Ten minutes.

The Court: Our rules provide that the official records of the Recording Office not be brought up here except under special circumstances.

Mr. Pfund: Has the witness prepared certified copies of these instruments to which you referred?

A. I have prepared certified copies of some of these.

Mr. Pfund: Of these about which you are testifying?

A. I believe that I have prepared certified copies of a number of these instruments. Not necessarily all of them. I would have to look in my records.

Mr. Bell: Your Honor, I believe this would be the one time that you would make the exception because certified copies of them over which we do not contend would just be cumbersome in the record.

The Court: You have them—you already have certified copies, do you not?

Mr. Bell: I do have some, and have introduced them.

The Court: Those that you offered in your case?

Mr. Bell: Yes, your Honor. The others are just to show lack of filing.

The Court: If that is the case, if there is no objection to them, that testimony can go in, but

(Testimony of Everett E. Smith.)

if there is objection, I will rule it out with the same ruling I made with regard to Miss Lowe's testimony.

Mr. Pfund: I make that objection, if your Honor please. It is utterly negligent testimony; incompetent, irrelevant and immaterial.

Mr. Bell: Your Honor, we have a Statute that says—both a Territorial Statute and Federal Statute—that says if they filed those, it is prima facie evidence of the work being done. If they don't file them, the burden of proof shifts, and it is upon them to prove they did it. Therefore, we have to prove the years they didn't file them, so that you can properly rule who the burden of proof is on.

The Court: The law that provided that, Mr. Bell, as you well know, was the Waskey Act, and the Waskey Act was repealed in 1936, so there is no Act about the burden of proof. [161]

Mr. Bell: Well, your Honor, we have a Territorial Statute.

The Court: Just a moment. There was a Territorial Act passed in 1933, which followed very much the wording of the Waskey Act, but it only referred to claims that were located thereafter, after '33, and also the repealing of the Waskey Act made it contrary to the Federal Law, so that it would be invalid for that reason, as well as only referring to claims located since '33. Consequently, it became a burden of proof law that is no longer in effect.

Mr. Bell: Well, if your Honor please, may I

(Testimony of Everett E. Smith.)

clarify the matter to ask you this? Wouldn't the law, the Waskey Act that you have held has been repealed by implication, it would be the law of the land up to the day in the summer of the passing of the 1939 Act, wouldn't it?

The Court: Yes.

Mr. Bell: Now, then, I have up until that time the law of filing these would prevail, wouldn't it?

The Court: No, it is a law of proof, and when the question of proof in court comes up, why then if the law was in effect, the burden of proof would be shifted, but it is no longer in effect, now.

Mr. Bell: Of course you know that is one of the real questions in this case.

The Court: It is a very good question, I will admit.

Mr. Bell: I don't want to annoy you by asking questions that would be surplus under your ruling.

The Court: Perhaps you could do it better to make an offer; state your rights at this time?

Mr. Bell: All right, come around please.

(Whereupon, the following proceedings were had out of the hearing of the jury:)

Mr. Bell: Comes now the Defendant, Grace Lowe, and offers to prove by this witness, if he was permitted to testify that there was no affidavits of labor filed, or intentions to hold, on the 'Snow Shoe' claim, except for the years of 1915, 1917, 1918, 1919, 1923, 1928 and 1929, and 1934. And we offer to show that there was no labor affidavits

filed and no exemptions for labor filed for the years of 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 1937, 1938, 1939, 1940, and that the same would apply to the 'L Association', if he was permitted to testify.

Mr. Pfund: To which we object on the ground that it is incompetent, irrelevant and immaterial; no proper foundation has been laid; does not tend to prove or disprove any [162] of the issues in this case; that the Waskey Act having been repealed and the 1939 Territorial Statute being in conflict with the general mining law after that and during that time, that the evidence offered does not tend to prove or disprove any of the issues, and is for that reason, incompetent, irrelevant and immaterial.

The Court: Objection sustained.

Mr. Bell: Exception.

(Whereupon, the proceedings were again continued in the hearing of the jury.)

Mr. Bell: I guess that is all, then. I have it all in the record there."

(Whereupon, Mr. Smith was excused as a witness.)"

(Tr. of Testimony, pp. 367 to 376.)

EXCEPTION No. 4

During the trial of these cases, the plaintiffs offered no testimony or evidence regarding the performance or non-performance of the annual labor

and assessment work upon either of the claims involved in these actions, the L Association and Snow Shoe Fraction, during any of the years prior to the fiscal year beginning July 1, 1938, and offered in evidence no proofs of labor or suspension notices covering any of such years prior to said fiscal year. The defendant offered to prove, as set out in Exceptions Nos. 2 and 3, that no proofs of labor or suspension notices were filed covering either claim prior to the year 1914; and that a proof of labor on the Snow Shoe alone was filed in 1915; nothing was filed for either claim in 1916; the joint intention to hold for the Snow Shoe and L Association was filed in 1917; the joint intention to hold for both claims was filed in 1918; and similar exemptions from annual labor for both were filed in 1919; nothing was filed for 1920 or 1921; two separate instruments, one for the L Association and one for the Snow Shoe Fraction were filed for the assessment year ending July 1, 1923, with the next instrument affecting either claim filed for the year ending July 1, 1928; and that there were no affidavits of labor filed or intentions to hold on the Snow Shoe claim, except for the years 1915, 1917, 1918, 1919, 1923, 1928, 1939 and 1934, and that there were no affidavits of labor [163] filed and no exemptions of labor or suspension notices filed for the years of 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 1937, and 1938, upon the L Association claim. That at the close of all the testimony the defendant moved the

Court to dismiss plaintiffs' cause of action and to render a judgment granting a non-suit of plaintiffs' action in case No. 5493 and an identical motion in case No. 5494, and thereupon requested the Court to instruct the jury to render a verdict for the defendant in case No. 5493 and also requested the Court to instruct the jury to render a verdict for the defendant in case No. 5494, upon the ground, among others, that the evidence and proof and the presumptions arising therefrom established that the said claims (the L Association and Snow Shoe Fraction) were forfeited for failure to perform the assessment work for many years prior to 1938, under the provisions of the Waskey Act, and that plaintiffs had failed to sustain the burden of proof showing the performance of the annual labor and assessment work during such years, as required by such act, which motions and requests the Court denied upon the grounds, among other things, that the said Waskey Act had been repealed as a whole in 1938, and that no rights or presumptions could accordingly arise or be asserted under it, to which rulings the defendant duly excepted.

EXCEPTION No. 5

After the taking of the testimony was completed and in due time and form, the defendant requested the Court, among other things, to instruct the jury as follows:

"INSTRUCTION No. 2

"You are further instructed that by the laws of Alaska, and especially the Act of 1907, there is

no provision for the resumption of labor and if the claim becomes forfeited for failure to do the annual labor thereon, that said ground immediately becomes open domain and subject to being located by anyone, and the resumption of labor on the part of the original locator or subsequent owners does not revive the claim; and if the original locator or subsequent owners want to protect their interest in said claim they must relocate the claim in the same manner as anyone else would be required to do. [164]

“INSTRUCTION No. 3

“You are further instructed that the laws of Alaska in force and effect in 1908 and in full force and effect at all times thereafter requires that a locator or owner of a mining claim or some other person having a knowledge of the facts may make and file with the said Recorder of the District in which the claim shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars (\$100.00) as aforesaid, and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name and number of the mining claim and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making such improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvements and by whom paid, when

the same was not done by the owner. Such affidavit shall be Prima Facie evidence of the performance of such work or making of such improvements, but if such affidavit be not filed within the time fixed by this section, the burden of proof shall be upon the claimant to establish the performance of such annual labor and improvements. And, upon failure of the locator or owner of any such claim to comply with the provisions of this section as to the performance of work and improvements, such claims shall become forfeited and open to claims by others as if no location of the same had ever been made.

“INSTRUCTION No. 6

“You are further instructed that if you find and believe from the evidence that during any year after the location of the two mining claims in question here that the owner thereof failed to do and perform the regular assessment work or cause the same to be done, then and in that event the claim would be forfeited and open to location by anyone who cared to locate on the same. And resumption of labor thereafter by the locaters or their assigns would not be sufficient to hold the ground, and if you find and believe by a fair preponderance of the evidence that between the years of 1908 and 1941 the locaters and their assigns failed or neglected to perform the labor as required by the mining laws of Alaska, then the claim would be forfeited and would be a part of the public domain subject to location, and if you further find that the defendant herein located said ground thereafter, before

the plaintiff or any of its predecessors in title re-located the same, then the location of the defendant would be justifiable under the law and she would have a right to hold the land the same as if no former location had ever been made.”

The Court refused to instruct the jury as requested and did not give the substance of such instructions, or any part thereof, in his charge to the jury, but on the contrary instructed the jury as regards such matters as follows: [165]

PART OF INSTRUCTION I

(d) The laws of Alaska in force in 1908 did not require the recording of any location certificate or notice. So, in the present case, it is not necessary to consider whether or not the location certificates filed conformed to the requirement of the law with reference to location certificates.

(h) Under the evidence in this case and the issues as made up by the pleadings, it is immaterial that the L Association contained within its boundaries as originally marked, acreage in excess of 20 acres for each locator.

INSTRUCTION III

(a) The laws pertaining to annual labor upon the Snow Shoe Fraction and the L Association require that \$100 worth of work or improvements be done upon or for the benefit of each said claim for each annual labor year, except in those years in which such law was suspended as to annual labor.

(b) You are instructed that the law does not prescribe the particular kind of labor which is to be performed upon a mining claim, nor in what it shall consist, nor the manner in which it shall be performed. Nor does the law require that it shall benefit the claim in the sense of making the claim more valuable after the performance of the labor than before. And you are therefore instructed that any labor performed upon a claim, if sufficient in amount, will satisfy the law, if its tendency is to develop the claim as a mine.

(c) The law presumes that when a person has made a valid location of a placer mining claim, he, the locator, will do the annual labor required by law to keep the claim alive. This presumption continues until it is shown by competent evidence that such annual labor was in fact not done.

In this case the defendant, Emma Grace Lowe, has alleged in her answer that during certain annual labor years, the annual labor required by law was not performed upon the claims in controversy herein. The burden of proof is upon said Emma Grace Lowe to prove such allegations, to wit: to prove by a preponderance of the evidence that the annual labor was not done upon one or both of said claims for at least one annual labor year. If there is no evidence as to the annual labor not being done for any annual labor year, you should presume that the work was done and so find. If there is evidence that the annual labor work was not done upon either of said claims for any annual labor year, and if such evidence is equally divided

or preponderates to the effect that such annual labor was done, you should find that such annual labor was done. If, on the other hand, the preponderance of the evidence shows that such annual labor was not done, you should so find.

INSTRUCTION No. IV

(a) The annual labor years designated by law were as follows: For 1909, up to and including 1919, the calendar years were the annual labor years; for the annual labor years 1920, the period was from January 1, 1920, to and including the first day of July, 1921; for the annual labor year of 1921, the period from July 2, 1921 to noon, July 1, 1922, was designated; thereafter, each annual labor year commenced at noon, July 1. For the annual labor year beginning July 1, 1938, the law provided that work during the annual labor year or work commenced in good faith before noon, September 1, 1939, and prosecuted with reasonable diligence to completion, should be sufficient for the annual labor year of 1938. [166]

Consequently, if you designate work as being done or not being done for a designated annual labor year, it shall be deemed to be that year or the extension thereof as above mentioned.

INSTRUCTION No. VI

You are instructed that you need not consider whether or not annual labor was done by the Plaintiff, or their predecessors in interest, for the calendar year of 1919 and the annual labor year commencing at noon, July 1, 1933, upon said Snow

Shoe Fraction and L Association, as sufficient intentions to hold without annual labor have been filed as to said claims.

INSTRUCTION No. VII

You are instructed that when a valid location of a placer mining claim is once made it vests in the locator and his successors in interest the right of possession thereto, which right cannot be divested by the obliteration or removal, without the fault of the locator or his successor in interest, of the stakes marking its boundaries, or the obliteration or removal from the claim of the location notice posted thereon.

INSTRUCTION No. IX

The defendant, Emma Grace Lowe, in this action claims under locations made in 1941. The law in force in Alaska in the year 1941 requires for a valid location of placer mining claims as follows:

a. That the locator of a placer mining claim must make a discovery of gold within the boundaries thereof, such discovery to be as hereinbefore mentioned in Instruction I-C.

b. You are instructed that it is immaterial whether the discovery or the makings of the boundaries came first, so long as both were perfected before there was an intervening location of the ground.

c. "Sec. 356. Notice of location of placer claim; boundaries. The discoverer of a placer claim shall designate the location as follows:

1. By posting on one of the posts or monuments

marking the boundaries of the claim a plain sign or notice containing:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The date of the location;
- (d) The number in feet in length and width claimed; and

2. By erecting at each corner or angle of the claim substantial monuments or posts not less than three feet in height nor less than three inches in diameter, hewn and marked with the name of the claim, the position or number of the monument and the direction of the boundary lines and by cutting out, blazing or marking the boundary lines so that they can be readily traced."

"Sec. 357. Recording certificate of location. The locator or locators of any lode or placer claim shall, within ninety days after the date of posting the notice of location on the claim, cause such claim to be recorded by filing with the recorder of the recording district in which the claim is located, a certificate of location which shall contain:

- (a) The name or number of the claim;
- (b) The name of the locator or locators;
- (c) The number of feet in length and width of the claim; [167]

(d) The date of discovering and of posting the notice of location;

(e) A description of the claim with such reference to some natural object or permanent monument that an intelligent person, with a

knowledge of the prominent natural objects and permanent monuments in the vicinity, could identify the claim.

Failure to file for record the certificate of location within ninety days as herein provided shall constitute an abandonment of the claim and the ground shall be open to location; provided, however, that full compliance with the provisions of this section after the ninety day period has elapsed, but before the ground has been located by another, shall operate to renew the location and save the rights of the original locator."

I instruct you that in order to establish a valid location of the Scorpion, Saturn and Jupiter claims, or either of them, the defendant, Emma Grace Lowe, for her principal Evelyn Mahan, must prove by a preponderance of the evidence that she made a substantial performance of each step of location as above set forth.

If the defendant proves a valid location of either of said claims by a preponderance of the evidence, you should so find. On the other hand, if the evidence in the case proves there was no valid location of either of said claims by said defendant, or if the evidence as to the same is equally divided, you should find that such claim or claims was not validly located.

INSTRUCTION No. X

a. You are instructed that the law of Alaska, during the time involved in the matters in controversy in these cases, permitted, but did not require

the filing of affidavits of annual labor, and that therefore you should not consider a failure to file an affidavit of annual labor as being any evidence that such annual labor was not performed.

b. The law of Alaska above-mentioned, makes an affidavit of annual labor which has been filed within three months of the end of the annual labor year prima facie evidence of the performance of the work therein stated, but if other evidence is introduced on the subject of annual labor or its value for the year covered by the affidavit, you should consider the affidavit and such other evidence and try to arrive at the truth of the matter and find in accordance with the preponderance of the evidence on that subject. [168] To which failure to instruct as requested and the instructions given as aforesaid the defendant duly excepted.

Exception No. 6

Reference is made to Exception No. 4 for a recital of the status of the testimony and offers of proof by the defendant regarding the performance or non-performance of annual labor and assessment work upon said claims (L Association and Snow Shoe Fraction) for the years prior to 1938, the failing to file proofs of labor or notices of suspension. Following the completion of the trial of this case and the return of the jury's verdict, the defendant in due time filed a motion for judgment notwithstanding the verdict upon the ground that the verdict of the jury was contrary to the evidence in that the plaintiffs have not proved the

performance of the annual labor upon said claims for many years as required by law, and that the Court has refused to instruct the jury at all on the contents of the so-called Waskey Act, and that the Court erred in refusing to sustain defendant's motion for dismissal of plaintiffs' cause before submitting it to the jury. This motion, in due course, was denied by the Court, to which ruling the defendant excepted.

Exception No. 7

That following the return of the jury's verdict, the Court requested briefs from counsel for the respective parties, among other things, on the point of the implied repeal of the Waskey Act, and the effect thereof, which matter was then briefed by counsel for the respective parties and in due course the Court rendered a detailed written opinion, holding and declaring, among other things, that the Waskey Act had been impliedly repealed as a whole in 1938, and that no rights or presumptions could now arise or be asserted under it, and directing that plaintiffs' counsel prepare and present forms of Findings of Fact and Conclusions of Law and Decree in conformity [169] with such opinion; that plaintiffs' counsel then submitted proposed forms of Findings and Fact and Conclusions of Law and Decree, quieting title, to which defendant in due time and manner submitted, among others, the following objections:

“VI.

“Defendant objects to plaintiffs' proposed find-

ing and fact number VI, for the reason that it is not based upon any competent evidence; is contrary to all of the evidence, and is against the clear weight of the evidence in that no proof of performing annual labor, required by law, was ever made in the trial of the case, and that no valid notices of intention to hold said mining claims were proven to have been filed for many years between 1908 and the date of the filing of this case.

“VII.

“Defendant objects to plaintiffs’ proposed finding of fact number VII, in that the same does not comply with the evidence; is contrary to the great weight of the evidence, on the contrary the evidence clearly showed that the defendant’s predecessor in interest made a genuine valid and complete location of a placer mining claim known as “The Saturn,” another known as “Scorpion Association,” and another as “Jupiter Association,” and at the time of making the location the lands covered thereby were a part of the public domain, was unoccupied and unclaimed mineral land, and that none of the plaintiffs had any interest in the land at that time. Their interest, if any, had been previously forfeited by failure to do the required assessment work and failure to properly file affidavits in support thereof, or in lieu thereof.

“IX.

“Defendant objects to plaintiffs’ proposed finding of fact number IX for the reason that the same is contrary to the evidence; is unsupported by any

competent evidence and against the clear weight of the evidence and is contrary to the established law and customs of Alaska.

CONCLUSIONS OF LAW

“1.

“The defendant Emma Grace Lowe objects to the plaintiffs’ proposed conclusion of law set forth under paragraph No. 1 for the reason that she contends it to be contrary to the laws of Alaska, and of the United States affecting the question involved herein, and said conclusion is based upon the Court’s contention throughout this entire proceedings that the act of Congress of May 31, 1938, which is Chapter 297 of United States Statutes at Large, Vol. 52, and found on page 588, did repeal Section 384 of Title 48 U. S. C. A.; which was passed in 1907, and generally referred to as the ‘Waskey Act.’ In this connection the defendant requests a finding of facts that the above referred to ‘Waskey Act’ is still in full force and effect in Alaska and a finding for the defendant on the questions covered by Paragraph I. [170]

1a.

“The defendant further objects to the conclusion of law wherein the ‘L Association’ claim is described, because there is no competent evidence to base such a conclusion on, and on evidence of the description as outlined in said requested conclusion of law.

2.

“Defendant objects to the plaintiffs’ proposed conclusion of law set out under Paragraph 2, for

all of the reasons set forth as objections to conclusion number 1, and in addition thereto, further objects thereto, since there is no evidence to support such a conclusion of law, there is no competent evidence describing the 'Snow Shoe Fraction,' as it is described in this conclusion of law. That said proposed conclusion is in conflict with the laws of the United States and the Territory of Alaska, and not based upon any facts proven in the case.

3.

"Defendant objects to plaintiffs' proposed conclusion of law No. 3, for the reason it is contrary to the laws of the United States and the laws of the Territory of Alaska, and is contrary to the evidence and not justified under the state of the record.

4.

"Defendant objects to plaintiffs' proposed conclusion of law set forth in Paragraph IV, for all of the reasons above set forth and for the further reason that it is contrary to the laws of the United States and the Territory of Alaska, and not based upon any competent proof in this case.

5.

"Defendant objects to plaintiffs' proposed conclusion of law set forth in Paragraph 5, for all of the reasons set forth above, which are hereby adopted as fully as if set out herein again."

That the Court thereupon denied such objections and executed the Findings of Fact and Conclusions of Law and Decree as submitted by plaintiffs'

counsel and caused the same to be entered in that form in the records of this Court, to which action the defendant duly excepted.

Exception No. 8

During the trial of said causes, the plaintiffs on rebuttal, in order to show the resumption of work on said mining claims offered in evidence plaintiffs' identifications Nos. 26, 27 and 28, which were received in evidence over defendant's objection [171] and marked as plaintiffs' Exhibits X, Y and Z, said exhibits being affidavits of labor, and Exhibit X, being in words and figures as follows:

PLAINTIFFS' EXHIBIT X

(No. 26 for Identification)

AFFIDAVIT OF ANNUAL LABOR
FOR YEAR 1938-1939

United States of America,
Territory of Alaska—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described;

That Affiant is the attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and

on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year beginning at noon the first day of July, 1938, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars (\$100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds \$100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: * * * * [173]

["Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including on page 176 the following:]

Fairbanks-Fish Creek	Character of Work	Value
Snowshoe Fraction	12½ man days brush cutting	100
L Association	12½ man days brush cutting	100''

(b) The number of days work done on each of said claims is the equivalent of 12½ days of 8 hours each of one man's labor for each \$100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor

and making the improvements was between noon of the first day of July, 1938, and noon of the first day of July, 1939.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine Corporation.

(e) The actual amount paid for such work or improvement was more than Thirty Two Thousand Four Hundred Thirty Seven Dollars (\$32,437.00) and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent of at least 12½ days work of 8 hours each of one man for each \$100 thereof.

JAMES D. CRAWFORD.

Subscribed and sworn to before me this 25th day of September, 1939.

(Seal) HERTHA N. BAKER,
Notary Public in and for the Territory of Alaska.

My Commission expires Feb. 28, 1941.

Approved as to form S. R. P. [179]

And Exhibit Y being in words and figures as follows:

PLAINTIFFS' EXHIBIT Y

(No. 27 for Identification)

AFFIDAVIT OF ANNUAL LABOR
FOR YEAR 1939-1940

United States of America,
Territory of Alaska.—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described:

That Affiant is the attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year beginning at noon the first day of July, 1939, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars (\$100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds \$100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: [181]

[“Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including among others:]

Fish Creek	Character of Work	Value
Snowshoe Fraction	Stripping moss	100
(page 186 transcript)		

(Note: The L Association claim is not included in this proof of labor.)”

* * * *

(b) The number of days work done on each of said claims is the equivalent of 12½ days of 8 hours each of one man’s labor for each \$100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor and making the improvements was between noon of the first day of July, 1939, and noon of the first day of July, 1940.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine corporation. [188]

(e) The actual amount paid for such work or improvement was more than Forty Seven Thousand One Hundred Twenty Seven Dollars (\$47,-127.00) and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent

of at least 12½ days work of 8 hours each of one man for each \$100 thereof.

JAMES D. CRAWFORD.

Subscribed and sworn to before me this 23rd day of September, 1940.

(Seal) HERTHA N. BAKER,

Notary Public in and for the Territory of Alaska.

My commission expires Feb. 28, 1941. [189]

And Exhibit Z being in words and figures as follows:

PLAINTIFFS' EXHIBIT Z

(No. 28 for Identification)

AFFIDAVIT OF ANNUAL LABOR FOR
YEAR 1940-1941

United States of America,
Territory of Alaska.—ss.

James D. Crawford, being first duly sworn, deposes and says:

That United States Smelting Refining and Mining Company is a corporation organized pursuant to the laws of the State of Maine, and is duly qualified to do business in the Territory of Alaska, and is the owner of the claims hereinafter described;

That Affiant is the Attorney in fact of said Company and is a person having knowledge of the facts herein set forth, and makes this affidavit for and on behalf of said owner for the purpose of complying with the laws of the United States and with Section 360 Compiled Laws of Alaska, 1933, as amended.

That said Company did, during the year begin-

ning at noon the first day of July, 1940, perform labor on or make improvements on or for the benefit or development of each of the mining claims hereinafter mentioned, of the value of not less than One Hundred Dollars (\$100.00) for each of said claims or of not less than the value hereinafter set forth after each claim or group of claims where said value exceeds \$100.00 per claim.

All of said claims are situated in the Fairbanks Recording Precinct, Territory of Alaska.

(a) The name or number of said claims, where each is situated, and the character and value of improvements made are as follows: [191]

["Here follows the names of a large number of claims together with a designation of the work claimed to have been performed upon each and the value thereof, including among others:]

Fish Creek	Character of Work	Value
Snow Shoe Fraction	55 foot prospect drill hole	\$165
L Association	48 foot prospect drill hole	144''

* * * *

(b) The number of days work done on each of said claims is the equivalent of 121½ days of 8 hours each of one man's labor for each \$100 for each 20 acres or fraction thereof.

(c) The date of the performance of such labor and making the improvements was between noon of the first day of July 1940 and noon of the first day of July, 1941.

(d) The person at whose instance the work was done or improvements made was the United States Smelting Refining and Mining Company, a Maine corporation.

(e) The actual amount paid for such work or improvement was more than Fifty Three Thousand Four Hundred Thirty Nine (\$53,439.00) Dollars and was paid by said United States Smelting Refining and Mining Company. Said owner actually paid its employees the above mentioned sum for said work which required the equivalent of at least 12½ days work of 8 hours each of one man for each \$100 thereof.

JAMES D. CRAWFORD.

Approved as to form.

Subscribed and sworn to before me this 25th day of August, 1941.

(Seal) HERTHA N. BAKER,
Notary Public in and for the Territory of Alaska.

My commission expires Feb. 28, 1945. [197]

Mr. James E. Crawford, dredge superintendent for the plaintiff U. S. Smelting, Refining and Mining Company was called as a witness on behalf of the plaintiffs, to identify such exhibits, and the proceedings regarding the identification, offering and reception of said exhibits in evidence are as follows:

“Testimony of JAMES E. CRAWFORD

Direct Examination on Rebuttal

“Questions by Mr. Pfund:

Q. Mr. Crawford, you have already been sworn?

A. Yes.

Q. And I will show you Plaintiffs' Identifica-

(Testimony of James E. Crawford.)

tion "26" and direct your attention to page 7, and ask if that is your signature? A. Yes.

Q. Did you prepare this instrument? A. Yes.

Q. After it was prepared, what did you cause to be done with it? A. It was prepared and executed and recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Mr. Pfund: If your Honor please, we offer Plaintiffs' identification "26" in evidence.

Mr. Bell: I object to it for the reason it hasn't been identified properly; no showing that it has anything to do with this law suit, and the instrument shows on its face that if it purports to be an affidavit of annual labor, it does not comply with the Statutes and laws of the Territory of Alaska in full force and effect during the years 1938 and '39, that it purports to cover. The instrument does not comply with that law in any way. It doesn't provide who did the work, it doesn't provide what kind of work was done, it does not provide at whose instance and request it was done, it does not show the necessity for doing the work, or the kind of work that was done, and it does not show on its face that the property involved herein was benefited in any way by it; and for the further reason there is no pleading of resumption of labor in this case. They cannot plead in this case anything they did not plead in the adverse claim, and they did not plead anything of that kind in the adverse claim filed affecting this particular property before the United States Land Office at Fairbanks.

(Testimony of James E. Crawford.)

Mr. Pfund: If your Honor please, this is rebuttal testimony. The defendant put on a witness who testified he saw no work done, and that he was out on the claim in question in March, 1939. He testified he saw no work done. This affidavit is for the purpose of simply rebutting that testimony. The Statute provides that when the affidavit is recorded, that it shall be prima facie evidence. That affidavit shows on the back of it it was recorded in the Fairbanks Recording District, and that is identified by the witness. Most of counsel's objections are artificial, because he didn't bother to read the affidavit to see what it claimed. [198]

Mr. Bell: I was following it when you dictated it. I object on the further reason there is already a forfeiture of the land before 1938 and 1939, and work done there on it at that time would not be effective to protect the land in the name of the plaintiff, herein; and for the further reason there is no title, properly proven, of the land or the mining claims. And for the further reason, your Honor, I call your attention, that there is an affidavit filed in this case of a different thing altogether—an affidavit by Sutherland as to the labor done for that year. Is that right? Is that what you said?

Mr. Pfund: I didn't understand you, Mr. Bell.

Mr. Bell: I understood you to say we showed an affidavit filed by Sutherland on that date. Is that what you said?

Mr. Pfund: I said that your witness, Radovich.

(Testimony of James E. Crawford.)

testified he was on the claim in 1939 and saw none of the people out there, as I recall his testimony.

Mr. Bell: He testified further, didn't he, that he didn't do any work for the United States Smelting and Refining Company, and the affidavit that was introduced in evidence showing that he did, that he and Dan Sutherland sunk this hole at the request of the United States Smelting and Refining Company was not true; he didn't do it. That is what he testified to. Now, then, they relied upon that. Now they find out that has been disproved, and go out and try to dig up another one, and they don't plead that anywhere in the adverse claim filed in the United States Land Office. Therefore, it is going beyond the adverse claim here.

Mr. Pfund: Not necessary for us to plead.

The Court: Objection overruled. It may be admitted.

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "X".

(Whereupon, Mr. Pfund read Plaintiffs' Exhibit "X" to the Court and jury.)

Mr. Bell: What date did you say it was recorded?

Mr. Pfund: September 28.

Mr. Bell: In '39 or '38?

Mr. Pfund: '39.

Mr. Bell: Comes now the Defendant and moves to strike the instrument since it has been read it shows to the Court that it does not meet the re-

(Testimony of James E. Crawford.)

quirements of Section 260 of the Compiled Laws of Alaska, which is—which does provide how an affidavit for annual labor can be filed, what it must contain, and how it should be, describe it, and this doesn't do that. Therefore, it doesn't meet the requirements of Section 260 of the Compiled Laws of Alaska.

The Court: Motion denied. [199]

Mr. Bell: Exception.

Q. Mr. Crawford, I will show you Plaintiffs' Identification "27", and direct your attention to page 9, and ask you if that is your signature? A. Yes.

Q. Who prepared this document? A. I did.

Q. And after you prepared it, what did you do with it? A. I had it recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Q. And you swore to it before a Notary? A. Yes, I actually swore to it.

Mr. Pfund: If your Honor please, we offer Plaintiffs' Identification "27" in evidence.

Mr. Bell: I object to it for the reason it is incompetent, irrelevant and immaterial; not tending to prove or disprove any of the issues in the case; it is not within the adverse claim filed in the United States Land Office at Fairbanks, Alaska, in Number MS 2105—or MA 05946; and for the further reason that it is incompetent and is not done in compliance with Section 260 of the Compiled Laws of Alaska. It does not meet the requirements in the Statute that requires, makes

(Testimony of James E. Crawford.)

the requirement of what the affidavit shall state. For the further reason the affidavit is ambiguous, uncertain, indefinite, it covers multitudes of property belonging to the plaintiff, and does not give the amount of work done or the name of the man doing the work. It does not show whether this particular man was paid for the work, it doesn't show what he did on these particular properties, and is therefore incompetent too, for any purpose under the laws, and we object to it on the further ground that it is—there is no proper foundation laid for it, because there is not a showing made up to this time that the ground had not been previously forfeited from 1908 up to this time, and the statement of 'stripping moss', of itself, does not show any benefit to this claim, and shows now, by the evidence here, that it would be positively no benefit, if they did do it, and that is all they contend in that affidavit.

The Court: May I see the instrument?

Mr. Pfund: I make the same statement, if your Honor pleases, with respect to this Plaintiffs' Identification "27" that I made with respect to the prior one.

The Court: Very well. You are offering this only for the 'Snow Shoe Fraction'?

Mr. Pfund: That is all, your Honor.

The Court: Objection overruled. It may be admitted.

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "Y".

(Testimony of James E. Crawford.)

(Whereupon, Mr. Pfund read Plaintiffs' Exhibit "Y" to the Court and jury.)

Q. Mr. Crawford, I show you Plaintiffs' Identification "28" and direct your attention to the last page, which [200] would be page 7, and ask you if that is your signature? A. Yes, it is.

Q. Who prepared this document? A. I did.

Q. After you prepared it, what did you do with it? A. I signed it in the presence of a Notary Public and had it recorded in the Office of the Recorder of the Fairbanks Recording Precinct.

Mr. Pfund: We offer Plaintiffs' Identification "28" in evidence, if your Honor please.

Mr. Bell: We object to it for the reason it is not properly identified; for the further reason it is not pleaded in the adverse claim in the United States Land Office; that it is not executed as by the laws of the Territory of Alaska required at the time, for the years of 1940 and '41; and for the further reason that it does not show any competent labor done on either of these claims, and it does not show—no—and for the further reason there is no proof and no proper foundation laid that the claims were not forfeited from 1908, at the time of the staking of the claims, up to the time of the filing of this; therefore, I think it is the duty to show it was in full force and effect at that time, or it would be forfeited by the terms of the Waskey Act, which was passed in 1907, and prior to the location of these claims.

Mr. Pfund: I make the same statement with

(Testimony of James E. Crawford.)

respect to this as I made with respect to the first of these affidavits, your Honor, which I believe was Plaintiffs' Exhibit "X".

The Court: Very well.

Mr. Pfund: I also call the Court's attention to this fact, that if there is any contention here with respect to resumption of labor, that there affidavits, of course, do show a resumption of labor and labor performed.

Mr. Bell: Your Honor, in response to that statement, before you rule—

The Court: I disagree with Mr. Pfund, but that is a legal question we needn't go into now.

Mr. Bell: That is right. Your Honor, I want to state one more objection and that is this, that if you should hold that resumption of labor does apply, now, and hold that the Waskey Act does not apply, then the laws of the Territory of Alaska at the time of the resumption of labor—that they are attempting to prove—prohibited the location of a claim the size of the "L Association". Therefore, the resumption of labor could not go back and do something that had been forfeited over the many years from the passage—from the location, up to the time that your Honor contends the Waskey Act was repealed, and then do something that the individuals could not do, themselves. That is, locate 160 acre claims at that time; at the time this resumption of labor is attempted to prove; and for the further reason there is no pleading of a resumption of labor anywhere in the pleadings in

(Testimony of James E. Crawford.)

this case, and I have repeatedly objected on that ground.

The Court: The objection to this Identification is overruled. It may be admitted. [201]

Mr. Bell: Exception.

Clerk of Court: Plaintiffs' Exhibit "Z".

Mr. Pfund: I will ask Mr. Clasby to read that file, may your Honor, please.

(Whereupon, Mr. Clasby read Plaintiffs' Exhibit "Z" to the Court and jury.)

Mr. Bell: Comes now the defendant and moves to strike this instrument. Since the reading thereof, it lacks the one requirement in the affidavit of acknowledgement of the person making the affidavit, that the labor and improvements was actually done on the "Snow Shoe Fraction", or the "L Association".

The Court: Motion denied.

Mr. Bell: Exception.

Mr. Pfund: That is all for Mr. Crawford."

(Tr. of Testimony 416 to 424.)

EXCEPTION No. 9

That the testimony submitted as regards the boundaries of the Snow Shoe Fraction claim was that as located and staked upon the ground in 1908, it was a fraction of ten acres, more or less, in rectangular form 350 feet wide by 1500 feet long, off the L Association claim on the left limit, and marked with four stakes, one at each of the four

corners. That as so located and staked the said Snow Shoe Fraction claim overlapped in large part certain prior locations known as the Miller Bench and Luloo, and perhaps others, all of which had been located prior to the said Snow Shoe Fraction and were valid, subsisting and outstanding locations upon the said area so in conflict at the time of such location of the Snow Shoe Fraction. That such prior locations subsequently went forward to patent as part of mineral surveys Nos. 1690 and 1696. That no subsequent amendment or re-staking of the Snow Shoe Fraction claim was claimed or shown but that the remainder of the ground, originally covered by said claim, after excluding said area in conflict, is as shown on the plat of mineral survey No. 2153, plaintiffs' Exhibit K, which is made a part of this Bill of Exceptions by reference, the original will by stipulation, be in the Appellate Court and described in paragraph 3 of the Findings of Fact and Conclusions of Law, as entered herein, and contains approximately [202] 2½ acres. That as recited in Exception No. 7, plaintiffs' counsel, pursuant to direction of the Court submitted forms of Findings of Fact and Conclusions of Law and Decree, to which defendant in due form and time submitted, among others, the following objections:

(Findings of Fact)

“Defendant objects to plaintiffs' proposed findings of fact Number III for the reason that the same is not sustained by the evidence; is contrary

to the evidence; is against the clear weight of the evidence, and is not a matter covered by the pleadings, and is incompetent, irrelevant and immaterial and not within the issues as to each and every part thereof. * * *

(Conclusion of Law)

“Defendant objects to the plaintiffs’ proposed conclusion of law set out under Paragraph 2, for all of the reasons set forth as objections to conclusion Number 1, and in addition thereto, further objects thereto, since there is no evidence to support such a conclusion of law, there is no competent evidence describing the ‘Snow Shoe Fraction’, as it is described in this conclusion of law. That said proposed conclusion is in conflict with the laws of the United States and the Territory of Alaska, and not based upon any facts proven in the case.”

The Court nevertheless caused said Findings, Conclusions and Decree to be entered in the form as submitted.

* * * *

[203]

EXCEPTION No. 12

That no testimony or proof was offered upon the matter of attorneys’ fees, at the trial of these cases, and no request was made by either party for the allowance of an attorneys’ fee until the proposed form of findings and conclusions and decree were submitted by plaintiffs’ counsel. Among the objections to the conclusions of law submitted by defendant appears the following:

“Defendant objects to plaintiffs’ proposed conclusion of law set forth under Paragraph No. 6, and the whole thereof, and especially the part that refers to a reasonable attorney’s fee, to be set by the Court for the reason that the plaintiff is not entitled to recover any attorney’s fee from the defendant under the evidence and condition of the record.”

The Court overruled such objection in executing the findings inserted of its own motion in Paragraph IX of the findings of fact and following matter:

“That the reasonable sum to be allowed the plaintiffs for attorneys’ fees herein is the sum of \$500.”

And inserted such amount in the blank space appearing in Paragraph 4 of the decree at the close thereof, to all of which action the defendant duly excepted.

/s/ BAILEY E. BELL,

Attorney for Defendant. [212]

CERTIFICATE OF JUDGE TO
BILL OF EXCEPTIONS

United States of America,
Territory of Alaska,
Fourth Judicial Division—ss.

I, Harry E. Pratt, Judge of the District Court of the United States for the Territory of Alaska, in and for the Fourth Judicial Division, and Judge of the above entitled Court, and the Judge before whom the above proceedings and all thereof were had and taken, as aforesaid, do hereby certify that

following the proceedings mentioned and set forth in the foregoing Bill of Exceptions the final decree quieting title was rendered and entered in said cause in favor of the plaintiffs as will more fully appear from the record herein, and I, being now willing that a record may be had, certified and preserved of the said proceedings above set forth and of the exceptions taken and preserved by the defendant in the above entitled cause, do hereby certify and declare that all of the matters and things set forth in the foregoing Bill of Exceptions are in all respects correct and true; that the exhibits considered material to this Bill of Exceptions are either incorporated at length in the Bill of Exceptions itself or the original exhibit has been physically attached hereto and made a part hereof, and that this Bill of Exceptions has been duly presented and allowed within the time and in the manner prescribed by the laws of the United States, the Territory of Alaska and the rules of this Court; and do further certify and declare that the same is hereby approved, settled and allowed as and for a Bill of Exceptions herein, and is hereby made a part of the record in this case.

Dated, settled and allowed this 8th day of May, 1948.

/s/ HARRY E. PRATT.

District Judge.

(Acknowledgment of Service attached.)

[Endorsed]: Filed April 27, 1948.

[Endorsed]: Filed May 8, 1948.

[213]

[Title of District Court and Causes Nos. 5493-94.]

CITATION

The President of the United States of America, to Walter Jensen, The United States Smelting Refining and Mining Company, a Maine Corporation, and the First National Bank of Fairbanks, Alaska, Administrator of the Estate of Gustaf Soderblom, Defendants, and Collins & Clasby and Southall R. Pfund, Attorneys for the Plaintiffs, who are Defendants in Error in this Appeal, Greetings:

You, and each of you are Hereby Cited to appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden in the City of San Francisco, State of California, within forty (40) days from the date of this Citation, pursuant to an order allowing an appeal, made and entered in the above-entitled action on the 8th day of April, 1948, in favor of the Plaintiffs in each of the cases as consolidated, and against the Defendant, Emma Grace Lowe, should not be corrected, set aside, and reversed.

Witness the Honorable Fred M. Vinson, Chief Justice of the Supreme Court of the United States of America, and the Honorable Harry E. Pratt, District Judge of this Court. [214]

Attest my hand and the seal of the above-named District Court for the Territory of Alaska, Fourth Judicial District, on this 8th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

Entered in Court Journal May 10, 1948. No. 36, page 268. [215]

MARSHAL'S RETURN ON CITATION

I, Stanley J. Nichols, United States Marshal for the Territory of Alaska, Fourth Judicial Division, do hereby certify and return that I received the hereto attached original Citation on the 13th day of May, 1948 at Fairbanks, Alaska; and that thereafter on the 13th day of May, 1948 at Fairbanks, Alaska I duly served the said writ on the First National Bank of Fairbanks by delivering a copy thereof to E. H. Stroecker, president, personally; and that thereafter on the 13th day of May, 1948 at Fairbanks, Alaska, I served the United States Smelting Refining and Mining Company, a Maine Corporation, by delivering a copy thereof to Roy B. Earling, General Manager, personally; and that thereafter on the 25th day of May, 1948 at Goldstream, 10 miles North of Fairbanks on the Steese Highway, I served Walter Jensen by delivering a copy thereof to Walter Jensen, personally.

Dated at Fairbanks, Alaska this 25th day of May, 1948.

STANLEY J. NICHOLS,
United States Marshal.

By /s/ CLINTON B. STEWART,
Deputy.

Marshal's Fees, \$9.00; Marshal's Expense, \$6.00;
Total, \$15.00.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1948. [216]

[Title of District Court and Cause Nos.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To John B. Hall, Clerk of the above-entitled Court:

You will please prepare a transcript of record in the above entitled cause, to be filed in the office of the Clerk of the United States Circuit Court of Appeals, for the Ninth Circuit, setting in San Francisco, California, heretofore perfected to said Court and include therein the following papers and records to-wit:

1. The Complaint in Case No. 5493.
2. The Complaint in Case No. 5494.
3. The Demurrer to the Complaint in Case No. 5493.
4. Answer in Case No. 5493.
5. Answer in Case No. 5494.
6. Stipulation filed on June 28, 1946.
7. Order overruling the Demurrer to the complaint in case No. 5493.
8. Reply in Case No. 5493.
9. Reply in Case No. 5494.
10. Instructions of the Court.
11. Verdict of the Jury. [217]
12. Defendant's Requested Instructions.
13. Defendant's Objections to Instructions.
14. Motion to dismiss Plaintiff's Cause of Action and render judgment for Defendant, filed in both cases as consolidated.
15. Motion for judgment Non Obstante Verdicto, filed in both cases.
17. Findings of Fact and Conclusions of Law.

18. Judgment and Decree, as rendered.
19. Notice of Appeal.
20. Petition for allowance of appeal.
21. Assignments of Error.
22. Order allowing appeal and fixing bond.
23. Bill of Exceptions.
24. Citation.
25. Praecipe for Record.
26. Appeal Bond.

This transcript to be prepared as required by the law and rules and orders of this Court, and of the Circuit Court of Appeals, for the Ninth Circuit Court, and the record is to be forwarded to the Clerk of said Ninth Circuit Court of Appeals of the United States at San Francisco, California so that it will be docketed therein within the time allowed for filing the same there as shown by the order of the Court allowing appeal and fixing the bond.

Dated at Fairbanks, Alaska, on this 8th day of May, 1948.

/s/ BAILEY E. BELL,
Attorney for Defendant.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 10, 1948. [218]

[Title of District Court and Causes Nos. 5493-94.]

APPEAL BOND

Know all men by these presents, that I, Emma Grace Lowe, as principal am held and firmly bound unto the United States of America in the sum of \$250.00 to be paid to the United States of America; to which payment well and truly to be made I bind myself, my heirs, assigns, executors, and administrators, jointly and severally, by these presents.

Dated this 10th day of May, 1948.

Whereas, lately in the District Court of the United States for the Fourth Division of the Territory of Alaska in two suits pending in said Court, which were consolidated for all trial purposes, the title and number of each of said cases are set out above; in said consolidated cases the Plaintiffs were granted a judgment against this Defendant quieting title to properties involved therein and granting the Plaintiff judgment against the Defendant for all costs of these actions, denying this Defendant any recovery in said cases as consolidated. The Defendant has filed in this Court a Notice of Appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

The conditions of the above obligation is such that if the [219] said Emma Grace Lowe shall prosecute said Appeal to effect and pay all costs that may be taxed against her if for any reason the Appeal is dismissed, or if the judgment is affirmed,

then, and in that event, this obligation to be void—otherwise to remain in full force and virtue.

Signed, sealed and acknowledged this 13th day of May, 1948.

Witnesses:

/s/ EMMA GRACE LOWE,
Principal.

/s/ EVERETT E. SMITH,

/s/ OLGA T. STEGER.

Subscribed and sworn to before me this 13th day of May, 1948.

(Seal) /s/ JOHN B. HALL,

Notary Public in and for the Territory of Alaska.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 13, 1948. [220]

[Title of District Court and Causes Nos. 5493-94.]

ORDER EXTENDING TIME TO FILE
COUNTER PRAECIPE

Upon the application of plaintiffs in the above entitled action, and good cause appearing therefor, it is hereby ordered that plaintiffs may have to and including the 29th day of May, 1948, in which to prepare, serve and file their counter praecipe indicating additional portions of the record to be incorporated into the transcript on appeal.

Done in open court this 19th day of May, 1948.

/s/ HARRY E. PRATT,

District Judge.

Entered in Court Journal May 19, 1948, No. 36, page 280.

[Endorsed]: Filed May 19, 1948. [224]

[Title of District Court and Causes Nos. 5493-94.]

ORDER APPROVING APPEAL BOND

Whereas, upon the 13th day of May, 1948, the above-named Defendant filed herein an appeal bond for the appeal of said cases to the Circuit Court of Appeals for the Ninth Circuit, which said bond was duly executed by said defendant, but was not executed by any sureties; and

Whereas, said Defendant deposited with the Clerk of this Court upon the 13th day of May, 1948, the sum of Two Hundred Fifty (\$250.00) Dollars cash, in lieu of procuring sureties upon said appeal bond; and

Whereas, the undersigned, Judge of said District Court, [230] upon the 13th day of May, 1948, did duly approve, as the appeal bond in this case, said cash deposit and said appeal bond;

Now, therefore, said appeal bond and said cash deposit of Two Hundred Fifty (\$250.00) Dollars are hereby approved as defendant's said appeal bond.

This order shall be effective as of May 13, 1948.

Done at Fairbanks, Alaska, this 21st day of May, 1948.

HARRY E. PRATT,
District Judge.

Entered Court Journal May 21, 1948, No. 36, Page 281-282.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 21, 1948. [231]

[Title of District Court and Causes Nos. 5493-94.]

COUNTER PRAECIPE FOR TRANSCRIPT
OF RECORD

To John B. Hall, Clerk of the above-entitled court:

You will please include in the transcript of record in the above-entitled cause which you are preparing, to be filed in the office of the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit, sitting in San Francisco, California, the following additional papers and records, to wit:

1. Plaintiffs' motion for order extending time to file counter praecipe;
2. Notice of hearing on motion for order extending time to file counter praecipe;
3. Order extending time to file counter praecipe;
4. Objections to defendant's appeal bond;
5. Order overruling objections to defendant's appeal bond;
6. Order approving appeal bond;
7. Notice of plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing the defendant's bill of exceptions;
8. Plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions;
9. Affidavit of Southall R. Pfund in support of plaintiffs' motion for an order setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions;
10. Order denying plaintiffs' motion for an or-

der setting aside and vacating the certificate of judge approving, settling and allowing defendant's bill of exceptions.

11. This counter praecipe.

Dated: May 28, 1948.

/s/ SOUTHALL R. PFUND,
/s/ CHARLES J. CLASBY,
Attorneys for Plaintiffs.

(Acknowledgment of Service attached.)

[Endorsed]: Filed May 28, 1948. [243]

[Title of District Court and Causes Nos. 5493-94.]

Southall R. Pfund, of Fairbanks, Alaska, and Charles J. Clasby, of Fairbanks, Alaska, attorneys for plaintiffs. Bailey E. Bell, of Fairbanks, Alaska, attorney for defendant.

OPINION

This is a suit to quiet title in support of an adverse filed in the Land Office against Defendant Lowe's applications for patents.

The plaintiffs allege ownership of the "L Association" and "Snow Shoe Fraction", placer mining claims, by virtue of locations thereof in 1906. The defendant claims the ground in [244] controversy by locations made in 1941, upon the theory (a) that the location certificates of plaintiffs' predecessors were insufficient; and (b) that the annual labor was not done as required by law.

The case was in the nature of a suit in equity, triable before the Judge, alone, but an advisory jury was empaneled. It found in favor of the plaintiffs, and against the defendant.

The legal phases of the case have been submitted to the Court upon briefs filed by counsel for the parties.

[“Points I and II refer to matters not believed by the appellant to be involved in this appeal and are therefore omitted.”] [245]

* * * *

III.

(a) As used hereinafter:

“C.L.A.” shall mean Compiled Laws of Alaska, 1933;

“Annual Labor” shall be deemed to mean improvement for the benefit of a mining claim to the extent of \$100, or mining work upon the claim in the same value, or mining work and improvements of the value of \$100 in a designated annual labor year.

(b) Section 2324 R.S.U.S., as a part of said Section 26 of the Alaska Act, provided in effect:

(1) That failure to perform the annual labor upon a mining claim did not render it open to relocation unless the owner failed to resume work upon the claim after such failure and before relocation thereof;

(2) That the owner of a validly located mining claim was presumed to have done the annual labor and the burden of proving the contrary was upon any person asserting the same.

Lindley on Mines, 3rd Ed., page 1503, Note 29.

Morrison's Mining Rights, 16th Ed., page 130; 40 C.J. 845.

(c) In the Act of Congress, approved March 2, 1907 (hereinafter called the Waskey Act), entitled "An Act to Amend the Laws Governing Labor or Improvements Upon Mining Claims in Alaska", 34 Stat. 1243; T. 48, S. 384 U.S.C.A.; Sec. 162 Compiled Laws of Alaska 1913, (the Section being erroneously dropped from [247] the 1933 C.L.A.) appears in effect the following provisions:

(1) That if there was a failure to do the annual labor required by law upon a mining claim, a forfeiture ensued and the right of the owner to resume work after such failure was abolished.

(2) That if an affidavit of annual labor was not filed within 90 days after the close of the annual labor year, the burden of proof was upon the "claimant to establish the performance of such annual labor and improvements".

(d) The Waskey Act, therefore, repealed by implication (as it had no repealing clause in it) the conflicting parts of Section 2324, R.S.U.S., as a part of the laws of Alaska, and as mentioned above in sub-paragraphs C(1) and (2).

Thatcher vs. Brown (CCA 9th, 1911) 190 F. 708.

Ebner Gold Mining Co. vs. Alaska-Juneau Gold Mining Co. (CCA 9th, 1914) 210 F. 599.

(e) The defendant asserts that when an affidavit of annual labor is required by law, the Was-

key Act provides, in effect, that failure to file an affidavit of annual labor is prima facie evidence that the annual labor was not done upon the claim.

For the purpose of treating the subject, it will be temporarily, only, assumed that such was the effect of the Waskey Act.

Section 2324, R.S.U.S., as a part of Section 26 of the Alaska law, and as amended by the Waskey Act, continued in that state until the amending Act of May 31, 1938, 52 Stat. 588; Title 48, U.S.C.A., Sec. 381, entitled "An Act to amend Section 26, Title 1, Chapter 1 of the Act entitled 'An Act making further [248] provision for a civil government for Alaska and for other purposes, approved June 6, 1900' ". This Act stated that said Section 26 was amended "to read as follows: 'Section 26. The laws of the United States relating to mining claims, mineral locations and the rights incident thereto are hereby extended to the Territory of Alaska; * * * *' ". Then follows some changes as to mining on and below tide water lands.

The 1938 amendment does not refer to the Waskey Act in any respect, nor does it include any of the provisions of the Waskey Act.

(f) The plaintiffs assert that if the Waskey Act repealed by implication the right given by Section 2324, R.S.U.S., to resume work after failure to do annual labor and for the owner of a claim to have the presumption that annual labor was done, the Act of 1938 making the laws of the United States, to-wit, Section 2324, R.S.U.S., a part of the laws of Alaska without mentioning or

including the provisions of the Waskey Act, repealed that Act by implication. The defendant maintains that the following rule of interpretation governs and that the Waskey Act remains in full force and effect. Said rule is as follows, as set forth in 50 Amer. Juris., page 558, Section 563:

“A later law which is merely a reenactment of a former law does not repeal an intermediate act which has qualified or limited the first one, but the intermediate act will be deemed to remain in force and to qualify or modify the new act in the same manner as it did the first. * * * * These rules are, however, mere canons of construction, or aids to the ascertainment of the legislative [249] intent, and must yield to such intent.”

The rule just set forth in the first sentence will hereinafter be called “the intermediate amendment rule”.

Of course, said rule was announced by courts in the light of the facts of the case before them and of the constitution and laws governing.

An examination of the cases which establish the rule will show the following:

(a) That there was a constitutional provision requiring that no law should be amended by reference to the title, only, but that the law should be re-enacted and inserted at length in the new act. Sec. 230, Lewis' Sutherland Statutory Construction (2nd Ed.).

(b) The new law should embrace no more than one subject, which should be expressed in the title. Sec. 100, *id.*

The part these constitutional provisions played in making said intermediate amendment rule is reflected in the cases on the subject. As Congress never had such limitations upon it, the rule cannot be of assistance in interpreting the intention of Congress as to an Act.

In: *State vs. Clauson* (Wash.) 190 P. 752-754, the Court said: "In construing the amendment of 1919 it is manifest that the use or repetition therein of language found in the original act, including that relating to the basis of the valuation of property of the district upon which the five percent. limit of indebtedness should be computed, which in no way interfered with the revisions and extensions the Legislature desired and intended [250] to accomplish by the amendment, was but a vehicle or means mandatorily required by the Constitution."

Quoted cases in this decision show that such was the situation also in the states of Michigan, New Jersey and Oregon.

Illinois also had a similar constitutional restriction. *People vs. Lloyd*, 136 N.E. 505.

In *Eddy vs. Kincaid* (Or.) 41 P. 156, rehearing page 655, which is cited as announcing said intermediate amendment rule, we find that although the Court, in the first hearing, stated the second amendment was not new matter and therefore did not amend the intermediate act, the basis of the opinion on rehearing was that the intention of the Legislature was not to repeal the intermediate act, this intention being shown by the title of the third act, and by the enumeration of the offices that were to be

filled at the election (said enumeration not including railroad commissioners).

In: *Allison vs. Hatton* (Or.) 80 P. 101, also cited as establishing the intermediate amendment rule, we again find the case being decided upon the intention of the Legislature, ascertained from the title of the act, and the fact that no provision was in it for making abstracts of title, from the records of the county which was allegedly losing the land, and filing them in the recorder's office of the county, which was allegedly receiving the strip of land.

While a few of the Oregon cases adhered to the intermediate amendment rule, the Supreme Court of Oregon definitely refused to follow the rule in the case of *State ex rel. Brady vs. Lightner* (Or. 1915) 152 P. 232.

Chapter 127, General Laws of Oregon, 1915, in [251] Sec. 1 thereof, amended Section 6313, L.O.L., as amended in 1913. The amendment consisted in adding a proviso that each incorporated city or town should constitute a separate road district.

Chapter 194, General Laws of Oregon, 1915, again amended Section 6313, as amended by the laws of 1915. This amendment consisted in leaving off the proviso which was put on by Chapter 127 aforesaid, and by changing the October term to the September term. With the exception of changing October to September, it was a copy of the law as it existed prior to said Chapter 127.

Thus the situation was entirely covered by the intermediate amendment rule.

The Court held: "Chapter 127, the first act, purporting to amend Section 6313, is superseded by the second act as far as there is any difference, because the Constitution requires that the act revised or section amended shall be set forth at length in the amendatory act. If there is anything to be added to section 6313 as set forth in the last amendatory act, the Constitution is thereby violated. * * * * * Amendment of an act or section by setting it out in full 'so as to read as follows' operates as an entire obliteration of the former act after the new one goes into effect." Citing, among other cases, "Columbia Wire Co. vs. Boyce, 104 F. 172; Heinze vs. Butte, 107 F. 165 (C.C.A. 9th)." It further stated: "It is settled by the great weight of [252] authority that the act amended, being the last expression of the Legislature, is the law. * *"

This case involves the same situation which confronts us in the present case, and it, in effect, overrules all prior Oregon cases to the contrary.

In: *In re Ferguson's Estate* (Pa.) 189 A. 289, at page 292 the Court said:

"If such radical departure from the legislative policy had been intended by the Fiscal Code, it would have been clearly indicated in the title as required by Article 3, Sec. 3 of the Constitution".

Illinois: *Smith-Hurd Rev. Stat. 1931, Chap. 131, Sec. 2*, provided that any provisions of any statute, so far as they are the same as those of any prior statute, shall be construed as a continuation of such prior provisions, and not as a new enactment. *City of Altamont vs. Baltimore and Ohio R. Co.* (Ill.

1932) 180 N.E. 809. Thus the statute of Illinois compels its courts to interpret a statute in the same manner as the interpretation declared by the intermediate amendment rule.

IV.

The rule is subject to the exception that where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed.

In *Gaston vs. Merriam* (Minn.) 22 N.W. 614, the intermediate amendment rule is set forth, and the court then says:

“If, then, Section 37, C. 6, Laws 1877, operated to modify * * * the same provisions of the law of 1874. regarding the time of redemption, it must be [253] deemed as continuing in force to modify or qualify the same provisions re-enacted in the Law of 1878 unless, (1) the act of 1878 covers the entire subject covered by Section 37, and was plainly intended as a substitute for it, and to furnish the only rules on the subject; or (2) that the provisions of the two acts are so irreconcilably inconsistent that they cannot stand together.”

To the same effect are:

Board of Education vs. Tyler County Court
(W. Va.) 67 S.E. 870;

Buchsbaum & Co. vs. Gordon (Ill.) 59 N.E.
(2) 832;

State ex rel. Brady vs. Lightner (Or.) 152
P. 232.

In *Hawes vs. Pliegler* (Minn.) 92 N.W. 223,

with reference to plaintiff's insistence that the rule of construction (intermediate amendment rule) governed the case, the Court said, p. 224:

"Both Acts, however, remain as they are on the statute books, but the former in time of enactment repeals the later, under the plaintiff's application of the strict, technical rules of interpretation. Meanwhile the citizen is inexorably held to the letter of the intermediate act, * * * *. But canons of construction are not arbitrary or infallible, and should not be permitted to prevail against reason and justice in construing inharmonious legislative enactments. * * * * 'Canons of construction are not the masters of the courts, but merely [254] their servants.' "

The court held that the third act repealed the intermediate amendment, though it re-enacted the first act without mentioning the intermediate one.

In: *In re Metcalf's Estate* (Pa.) 179 A. 587, the court said that the appellant, in relying on the rule (intermediate amendment rule):

"ignores the exception to the rule that, 'where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed.' "

The holding of the Pennsylvania courts that a subsequent amendment which was inconsistent with an intermediate amendment would repeal the intermediate amendment to the extent of the inconsistency, was approved by the Pennsylvania Legislature by the Act of May 18, 1937, Article V, Sec-

tion 75, 46 P.S., Section 575, providing "whenever two or more amendments are made, if they are irreconcilable, the later in date shall prevail."

In: *State vs. Klasen* (Minn.) 143 N.W. 985, the court stated, with reference to the intermediate amendment rule:

"It may be conceded that chapter 43 is an intermediate act within the rule, * * * * The principle stated, however, is a mere canon of construction, or aid to the ascertainment of legislative intent, and must yield to the latter. * * * * Laws are presumed to have been passed with deliberation, and with full knowledge of all existing ones on the same subject. * * * * we reach the conclusion that the provisions [255] of the two acts are so irreconcilably inconsistent that they cannot stand together, * * * *". The last amendment was held to be controlling. To the same effect is the case of *Klarne vs. Drainage Dis.* (Ill.) 43 N.E. (2) 986-968.

V.

Construction of Acts of Congress never were aided by the intermediate amendment rule.

When it passed the 1938 Act, Congress is presumed to have known the law upon the subject, to-wit, Sec. 2324, R.S.U.S., as a part of Sec. 26 of the Alaska law, as amended by the Waskey Act.

50 Amer. Juris. 331;

Sullivan vs. Ward (Mass.) 24 N.E.(2) 672:

State vs. Klasen (Minn.) 143 N.W. 985.

In: *Continental Ins. Co. vs. Simpson* (CCA 4th) 8 P.(2) 439, at page 442 the court says:

“The legislature is presumed to legislate with knowledge of former related statutes * *”.

“In: “The Penza” (CCA 2nd) 9 P.(2) 527-528, it was held:

“It is always assumed that statutes are passed in light of, and with reference to preexisting law * * * *”.

If, in 1938, Congress had intended to amend only the portion of said Section 26 of the Alaska law which referred to mining on beaches, it could have expressed that intention very simply, not being required by the constitution or statutes to [256] repeat the wording of the statute on the other subject.

Congress having, in plain unambiguous words stated in the 1938 Act that the laws of the United States relative to mining claims and rights incident thereto, should be in force in Alaska, there is no room for construction.

United States vs. Missouri Pac. Railroad Co., 278 U.S. 269-277, where the court said:

“It is elementary that where no ambiguity exists there is no room for construction. * * * * Construction may not be substituted for legislation.”.

The same rule is in Commissioner of Immigration vs. Gottlieb, 265 U.S. 310.

. Having, in 1900, by Section 26 of the Alaska Act, placed the laws of the United States in operation in Alaska as to mining claims and rights incident thereto, and having found that wording successful in carrying out its intent, there was no reason for Congress to change that wording in 1938 when it

intended to do the same thing. There is no reason why Congress should abandon any phrases merely because they have been used before, there being no law governing Congress which makes it necessary or expedient so to do.

In: *Wilbur vs. U.S. (C.A.D.C.)* 30 F.(2) 871, the court says, at page 872:

“Rules of statutory construction are never used to create, but only to remove, a doubt.”

In: *Crooks vs. Harrelson*, 282 U.S. 55, the court said, at page 59:

“It is urged, however, that if the literal [257] meaning of the statute be as indicated above, that meaning should be rejected as leading to absurd results, and a construction adopted in harmony with what is thought to be the spirit and purpose of the act in order to give effect to the intent of Congress. The principle sought to be applied is that followed by this court in *Holy Trinity Church vs. United States*, 143 U.S. 457; but a consideration of what is there said will disclose that the principle is to be applied to override the literal terms of a statute only under rare and exceptional circumstances. The illustrative cases cited in the opinion demonstrate that to justify a departure from the letter of the law upon that ground, the absurdity must be so gross as to shock the general moral or common sense, * * * And there must be something to make plain the intent of Congress that the letter of the Statute is not to prevail. *Treat vs. White*, 181 U.S. 264, 268.”

In *Northern Pac. Railway vs. Concannon*, 239 U.S. 362, at page 385 the court says:

“* * * * this interpretation of the act is inconsistent with its text * * * *. We say it is inconsistent with its text because in express terms the validating power * * * was made applicable only to ‘all conveyances heretofore made’, and nothing in the context [258] lends itself to the conclusion that Congress contemplated conferring on the Railway Company unlimited power * * * *.”

“The court cannot attribute to the Legislature an intent which is not in any way expressed in the statute.” 59 C.J. 958.

Resort cannot be had to the legislative history of an act unless the statute is ambiguous. 50 Amer. Juris. 321, Sec. 328.

“It is urged that the statute is highly penal in character and should therefore be construed strictly. But the object of all construction, whether of penal or other statutes, is to ascertain the legislative intent; and in penal statutes, as in those of a different character, ‘if the language be clear, it is conclusive’.” *Osaka Shosen Kaisha Line vs. U. S.*, 300 U.S. 98, 101.

The fact that the Act of 1938 purports only to amend Section 26 of the Alaska Act of 1900 and does not mention the amendment thereof, is immaterial as the reference to the original act means that act, as amended, up to the date of the reference.

State ex rel. Brady vs. Lightner (Or.) 152 P. 232, 233;

Whitfield vs. Davies (Wash.) 138 P. 583-1;

Duke vs. Amer. Casualty Ins. Co. (Wash.) 226 P. 501;

Fletcher vs. Prather (Calif.) 36 P. 658;

West & Co. vs. Board of Com. (Idaho) 34 P. 445; [259]

Yakima Amusement Co. vs. Yakima County (Wash.) 73 P. (2) 519;

State ex rel. City of Omaha vs. Board of Com. (Neb.) 189 N.W. 639;

50 C.J. 881, Sec. 464; also page 883, Sec. 472.

VI.

The intermediate amendment rule has never been the rule or construction of Acts of Congress or state laws where not required by a Constitution or Statute.

In *Heinze vs. Butte & B. Counsel. Min. Co.* (9th Cir.) 107 F. 165, it was held as set forth in the syllabus:

“The act of June 6, 1900, providing that section 7 of the act of 1891, relating to the jurisdiction of the circuit court of appeals as to injunction cases, should be amended to read as therein prescribed, is valid, notwithstanding it purports to amend a section of the act which had already been amended by the act of February 18, 1895, to which it did not refer, and its enactment necessarily operates to repeal the latter amendment.”

To the same effect are:

Columbia Wire Co. vs. Boyce, (7th Cir.) 104 F. 172;

Whitfield vs. Davies (Wash.) 138 P. 863;

Rouw Co. vs. Crivella (8th Cir.) 105 P. (2) 434-436; [260]

Koprivica vs. Sather, 10 Alaska 593.

In: In re Lont, 34 Fed. Supp. 700, the court stated, page 705:

“This is legislative reaffirmation of what was originally said in 1918, in the face of Act 145 of 1934. The implied amendment of the act of 1918 by Act 145 of 1934 is, therefore, nullified.”

In *Continental Ins. Co. vs. Simpson* (CCA 4th) 8 F. (2) 439, at page 441 the court says:

“But in both the Legislature first amended the original statute and then at a different time again amended and re-enacted it, omitting the first amendment. The rule is well established, and the reason for it plain, that the first amendment of a statute is repealed when the statute referred to is again amended and wholly re-enacted with the omission of the first amendment.”

In *Vansant Kitchen & Co. vs. Commonwealth* (Va.) 60 S.E. 753, the Court said:

“We think it plain that the second amendment operated as a repeal of the first amendment * * * *. ‘The repeal of a statute by implication is not favored by the courts * * * *. To justify the presumption of an intention to repeal one statute by another, the two statutes must be irreconcilable * * * *. But where the latter statute was plainly intended to embrace [261] the whole legislation on the subject to which it refers, and to be wholly substituted for all former statutes on the same subject, it must be held to be a legislative declaration that whatever is embraced in it shall prevail, and whatever is excluded is discarded and repealed.’ ”

In *Western Assur. Co. vs. Stone* (Va.) 134 S.E. 710, the court approves the "reasons and authorities" of the court in the case of *Vansant Kitchen & Co. vs. Commonwealth*, *supra*.

In 1900, when the laws of the United States relative to mining claims and rights incident thereto were adopted for Alaska by Section 26 of the Alaska Act, such adopted laws were complete legislation upon that subject. Therefore, when the Act of 1938 again put the laws of the United States forward as the laws governing Alaska with reference to mining claims and rights incident thereto, that act embraced the whole legislation upon the subject and was to be wholly substituted for any formed statutes.

VII.

From the foregoing, it appears that the Act of 1938 repealed the Waskey Act insofar as it provided:

(a) For the abolishment of the right to resume labor upon a mining claim after failure to do the annual labor thereon;

(b) That failure to file the annual labor affidavit should throw the burden on the claimant [262] to prove the doing of the annual labor.

VIII.

The Waskey Act did not make the failure to file an affidavit of annual labor *prima facie* evidence that the annual labor was not done.

The wording of the Waskey Act upon the above subject is:

"Such affidavit shall be *prima facie* evidence of

the performance of such work or making of such improvements, but if such affidavit be not filed within the time fixed by this Act, the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements and upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to the performance and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made.”

Inasmuch as the law makers had just used the words “prima facie evidence” as to the effect of filing an affidavit of annual labor, it would have been natural for them to have used the same words if they intended to state the converse, to-wit, that the failure to file such an affidavit should be prima facie evidence that the annual labor was not done.

Attention is called to the use of the word “Claimant”, [263] in describing one upon whom the burden of proof was to be placed if there was a failure to file an affidavit of annual labor. That is a word which is seldom used with reference to a party to a suit in court. An examination of the Land Office rules with reference to the procedure for getting patents to mining claims shows that in the first 108 regulations the word “claimant” is used 32 times to describe the applicant for a patent.

As the statutory rule of construction is that words are to be given their common meaning unless the statute shows they were used with some

other meaning, the word "claimant" in the Waskey Act should be presumed to refer to the applicant for patent in the Land Office.

The fact that a later Act of Congress amending the mining laws also has one section which relates entirely to Land Office matters, to-wit, patenting a mining claim, lends some weight to the above-mentioned interpretation.

The Act of Congress approved August 1, 1912 (37 Stat. 243; 48 U.S.C.A., Sec. 390; Sec. 351, C.L.A.), and being entitled: "An act to modify and amend the mining laws in their application to the Territory of Alaska, and for other purposes", in the next to the last section thereof, provides:

"Sec. 4. That no placer-mining claim hereafter located in Alaska shall be patented which shall contain a greater area than is fixed by law, nor which is longer than three times its greatest width."

But even if the word "claimant" be interpreted to mean a party in court affirmatively claiming that the annual labor was done upon his claim, the Waskey Act would not place the burden of proof upon the plaintiffs in this case, because they never got to the point where they were claimants. As the plaintiffs showed valid locations of their mining claims, the law raised the presumption that they did the annual labor upon the claims. This [264] presumption continued until the defendant made a *prima facie* showing that the annual labor was not done. Until such showing was made, and it never was made in this case, the plaintiffs were not required to say anything about annual labor

and therefore were never to be classified as "claimants".

The above interpretations are in keeping with the attitude of the courts toward forfeitures.

It was stated in 2 Lindley on Mines (3rd Ed.), Sec. 645:

"We have heretofore observed the reluctance with which the courts enforce this penalty. They have settled the doctrine that the forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law. * * * * The courts do not incline to the enforcement of this class of penalties, which have always been deemed in law odious."

Also Morrison's Mining Rights (16th Ed.), 632.

IX.

Effect of repeal of Waskey Act on burden of proof.

Even if the Waskey Act made prima facie evidence out of the fact that an affidavit of annual labor was not recorded, its repeal by the Act of 1938 freed cases, arising before but commenced after the repeal, of such prima facie provision. 59 C.J. 1173.

"Remedial statutes, such as this, which affect only the procedure and practice of the courts in the enforcement of a right, and which do not impair the right itself, or wholly destroy a pre-existing remedy, are retroactive in the sense that they must be applied to causes of action existing at the

time of their passage in all cases where the suit is subsequently commenced." (Southern Indiana Ry. Co. vs. Peyton (Ind. '01), 61 N.E. 722, 723).

This rule has been applied in cases involving the shifting of the burden of proving or disproving contributory negligence.

Smith vs. Freeman (Mass. '29) 167 N.E. 335;

Sackheim vs. Pigueron (N. Y. '15) 109 N.E. 109;

Southern Indiana Ry. Co. vs. Peyton, *supra*.

The New York Court of Appeals, holding that a statute permitted suit upon a money judgment, even though no such suit was possible at the time the judgment was entered, stated:

"It is the settled law that statutes relating to procedure are retroactive and prospective in their application without affirmative provisions to that effect." (Peace vs. Wilson (N. Y. '08), 79 N.E. 329, 330).

The same rule has been applied by many courts;

Bear Lake Irrigation Co. vs. Garland, 164 U. S. 1;

South Carolina vs. Gaillard, 101 U. S. 433;

Virginia & W. Va. Coal Co. vs. Charles (W. D. Va. '17), 251 P. 83, 127-128;

Carson vs. Miami Coal Co. (Ind. '23), 141 N.E. 810;

Woodvine vs. Dean (Mass. '07), 79 N.E. 882;

Stocker vs. Foster (Mass. '01), 60 N.E. 407;

First Methodist Episcopal Church vs. Fadden, (N. D. '92), 77 N.E. 615;

Ensley vs. State (Okla. '10), 109 P. 230;

Baxter vs. Hamilton (Mont. '97), 51 P. 263.

Consequently, the burden of proof was upon the defendant to show that annual labor was not done either before or after the repeal of the Waskey Act. [266]

(Points X and XI also refer to matters which the appellant believes are not involved in this appeal and are therefore omitted.)

* * * *

XII.

The findings of fact set forth by the advisory jury in their verdict herein are confirmed as correct and adopted as the findings of the court.

Findings of fact and conclusions of law may be drawn pursuant to the above opinion.

Done at Fairbanks, Alaska, this 18th day of December, 1947.

HARRY E. PRATT,

District Judge. [273]

[Endorsed]: Filed Dec. 18, 1947.

[Title of District Court and Causes Nos. 5493-94.]

CERTIFICATE OF CLERK

I, John B. Hall, Clerk of the District Court for the Territory of Alaska, Fourth Judicial Division, do hereby certify that the foregoing, consisting of 273 pages, constitutes a full, true, and correct transcript of the record on appeal in Cause No. 5493 and 5494, entitled: United States Smelting, Refining, and Mining Company, a Maine Corporation,

Plaintiff, vs. Emma Grace Lowe, Defendant, and Gustaf Soderblom, Walter Jensen, and United States Smelting, Refining, and Mining Company, a Maine Corporation, Plaintiffs, vs. Emma Grace Lowe, Defendant, respectively, and was made pursuant to and in accordance with the Praeceptum of the Plaintiffs and Appellees, and Defendant and Appellant, filed in this action, and by virtue of the said Appeal and Citation issue in said cause, and is the return thereof in accordance therewith, and I do further certify that the Index thereof, consisting of pages "a" and "b", is a correct index of said Transcript of Record, and that the list of attorneys, as shown on page "c", is a correct list of the attorneys of record; also that the cost of preparing said transcript and this certificate, amounting to \$31.75 has been paid to me by counsel of the appellant in this action.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said Court this 7th day of June, 1948.

/s/ JOHN B. HALL,
Clerk.

[Endorsed]: No. 11953. United States Circuit Court of Appeals for the Ninth Circuit. Emma Grace Lowe, Appellant, vs. United States Smelting, Refining and Mining Company, a Corporation, First National Bank of Fairbanks, Executor of the Estate of Gustaf Soderblom and Walter Jensen, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Territory of Alaska, Fourth Division.

Filed June 10, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 11953

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING &
MINING COMPANY, a Corporation, et al,
Appellees.

APPELLANT'S STATEMENT OF POINTS TO
BE RELIED ON AND DESIGNATION OF
PARTS OF RECORD TO BE PRINTED

Comes now the appellant, Emma Grace Lowe, and submits herewith her statement of the points upon which she intends to rely on this appeal and

designates the parts of the record which she thinks are necessary for the consideration thereof, as follows:

I.

The points upon which appellant intends to rely and have determined upon this appeal are:

(1) The question of the implied repeal of the so-called Waskey Act (title 48, section 384, U.S. C.A.) by the 1938 amendment to section 381, title 48 and questions regarding the extent and effect thereof, appellant contending:

(a) That the Waskey Act was not repealed by the 1938 amendment to the 1900 statute because the 1938 amendment was not a new enactment, making the general mining laws applicable to Alaska, but such provision was merely copied word for word from the act of 1900 without change, the changes being with regard to entirely different provisions of the law. (mining on tide lands, etc.)

(b) Even if the Waskey Act had been impliedly repealed in 1938 such repeal would not affect the rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do the assessment work during the period while the Waskey Act was in force.

(c) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 amendment such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of

labor and the presumption of non-performance arising from failure to file.

(2) Variance in the description of the Snow Shoe Fraction claim between the allegations of the complaint, etc., and recitals of the adverse claim and findings.

(3) The propriety of allowing and fixing attorneys' fees under the circumstances.

* * * *

Respectfully submitted:

/s/ HAROLD BANTA,
Attorney for Appellant.

(Duly Verified.)

(Acknowledgment of Service attached.)

[Endorsed]: Filed October 1, 1948. Paul P. O'Brien, Clerk.

United States
Court of Appeals
for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING, AND
MINING COMPANY, a corporation, FIRST
NATIONAL BANK OF FAIRBANKS, Executor
of the Estate of Gustaf Soderblom and WALTER
JENSEN,

Appellees.

Appellant's Opening Brief

Appeal from the District Court of the United States for
the Territory of Alaska, Fourth Judicial Division.

Honorable Harry E. Pratt, District Judge

FILED
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Appellant's Opening Brief

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ATTORNEYS OF RECORD

BAILEY E. BELL,

Fairbanks, Alaska (In the District Court)

HAROLD BANTA,

Hallock, Donald, Banta & Silven,

Baker, Oregon (On the appeal)

Attorneys for Appellant

SOUTHALL R. PFUND,

Pillsbury, Madison & Sutro,

San Francisco, California

CHARLES J. CLASBY,

Fairbanks, Alaska

Attorneys for Appellees.

No. 11953

UNITED STATES COURT OF APPEALS
for the Ninth Circuit

EMMA GRACE LOWE,

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UNITED STATES SMELTING, REFINING
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NATIONAL BANK OF FAIRBANKS, Execu-
tor of the Estate of Gustaf Soderblom and WAL-
TER JENSEN,

Appellees.

APPELLANT'S OPENING BRIEF

JURISDICTIONAL STATEMENT

These are two suits to quiet title brought under Section 4001, Compiled Laws of Alaska, brought in support of adverse claims, filed in the Land Office (see Title 30, Section 30, and Title 48, Section 386, U. S. C. A.). Case No. 5493 involves the so-called Snow Shoe Fraction claim (Pages 2 and 3, Transcript of Record) and Case No. 5494 involves the so-called L. Association placer claim, (Pages 6 and 7, Transcript of Record) both situated on Fish Creek, a tributary of the Little Chena river in the Fairbanks Recording Precinct, Territory of Alaska. The two cases were put at issue by filing answers (Pages 10 to 27, Transcript of Record)

and replies thereto (Pages 26 to 31, Transcript of Record.) The two cases were consolidated for purpose of trial and tried by the Court with an advisory jury, resulting in a decree quieting title in favor of the plaintiffs-appellees (Pages 63 to 67, Transcript of Record) from which the defendant-appellant has appealed to this Court. The authority for the appeal is of course found in Title 28, Section 225, U. S. C. A. as amended. Notice of Appeal, Petition for Allowance of Appeal, Assignment of Errors and Order Allowing Appeal and Fixing Amount of Bond appear at Pages 67 to 87, Transcript of Record, and the Citation on Appeal, Praecipe for Transcript of Record, Appeal Bond and Order approving the same, appear on Pages 136 to 142, Tr. R. This being an appeal from a District Court of the Territory of Alaska, the old procedure was followed.

It is submitted that the record is ample to sustain the jurisdiction of this Court and to authorize the Court to determine the points hereinafter mentioned, as well as various other matters raised in the Lower Court but not, for the reasons hereinafter set forth, now deemed of controlling importance on this appeal. Inasmuch as we believe no particular contentions will be urged regarding the jurisdiction of the Lower Court to hear these cases or the jurisdiction of this Court over the appeal, no further space will be devoted to this aspect of the matter.

STATEMENT OF THE CASE

The locations of the L Association and Snow Shoe Fraction claims, under which appellees claim, were both made in 1908. (Pages 2, 3, 7, 13 and 22, 23, Transcript of Record) The adverse locations of the Scorpion Association, Jupiter Association and Saturn placer claims (Mineral Survey No. 2105) under which appellant claims, and covering in part the same ground, were made in 1941. Appellant contends that the L Association and Snow Shoe Fraction locations had been forfeited for failure to do the annual assessment work during many of the fiscal years which intervened between the date of their location, 1908 and 1940, (See Pages 14 to 18 and 23 to 26, Transcript of Record.) Appellees contend, and the District Court sustained their contention, that the so-called "Waskey Act" (34 Stat. 1243, Title 48 U. S. C. A., Sec. 384) was impliedly repealed by the 1938 Amendment to Title 48, Sec. 381, U. S. Code Annotated, which among other things provides the laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are extended to Alaska, so that the absolute forfeiture for failure to do assessment work provided for in the Waskey Act is no longer effective. This is the principal point involved on this appeal. It was raised in various ways in the District Court, among others as follows:

(A) By motions for non-suit at the close of plaintiff's case in chief, Assignments of Error No. V and VII (Page 75, Tr. of Rec.) IX (Page 76 Tr.), LXX (Pages 81 and 82, Tr.), Exception No. 1 (Pages 88 to 90 Tr.)

(B) By rulings on and exclusion of evidence and denials of offers of proof. See Assignments numbered XVII and XVIII (Page 77 Tr.) XIX (Page 78 Tr.) LVII (Page 80 Tr.) C, CII, CXXI, CXXIII, CXXIV (Pages 82 to 84, Tr.) Exceptions numbered 1, 2, 3 (Pages 88 to 100 Tr.) and 8, (Pages 116 to 131 Tr.)

(C) By motions for non-suit and directed verdict at the close of all the evidence. See Assignments numbered XI, XII, (Page 76, Tr.) XXV, XXVI, (Page 79 Tr.) L and LI (Page 80, Tr.) Exception No. 4, Pages 100 to 102 Tr.

(D) By request for instructions and objection to instructions given. See Assignment XIV, XV and XVI (Page 77 Tr.) Exception No. 5, Pages 102 to 111 Tr.

(E) By motions for judgment notwithstanding the verdict Pages 49 to 53 Tr., Assignment No. XIII (Page 76 Tr.) Exception No. 6, Pages 111 and 112 Tr.

(F) And by objections to the findings and con-

clusions and decree. See Assignments XX, XXI and XXII (Page 78 Tr.) XXVII (Page 79 Tr.) XXVIII, XXIX (Page 80 Tr.) and CXXXI (Page 85 Tr.) Exception No. 7, Pages 112 to 116 Tr.

These Assignments and Exceptions all deal with one aspect or another of the same point, the question of the implied repeal of the Waskey Act and its effect. Appellant's contentions in this regard were urged upon the Trial Court a dozen or more times in almost as many different ways. We believe that no claim will be urged by appellees but that this was the principal point involved in the case and repeatedly raised and argued to the Court throughout the trial. After the trial and the rendition of the jury's verdict, the trial judge, being in doubt as to his ruling upon these and other points, requested briefs from counsel for the respective parties, which were furnished, and in due course rendered a written opinion which is set forth, so far as material here, on Pages 144 to 165, Transcript of Record. The writer now finds that this opinion was reported in 74 Fed. Supp. 917. It will, we believe, be simpler and perhaps avoid confusion if we simply refer to the pages of the printed report than to the Transcript of Record.

In submitting this brief we will discuss the Court's opinion in some detail and endeavor to point out the

respects in which we believe the trial judge erred. Appellant's contentions on this matter of implied repeal are set out in the statement of points to be relied upon (Pages 168-169 Tr.) as follows:

(1) That the Waskey Act was not repealed by the 1938 Amendment to the 1900 Statute because the 1938 Amendment was not a new enactment, making the General Mining Laws applicable to Alaska, but such provision was merely copied word for word from the Act of 1900 without change, the changes being with regard to entirely different provisions of the law. (Mining on Tidelands, etc.)

(2) Even if the Waskey Act had been impliedly repealed in 1938, such repeal would not affect rights and status that had accrued and become vested prior to the repeal, and would in no way revive locations such as the ones involved here that had become void for failure to do assessment work during the period when the Waskey Act was in force.

(3) Even if the automatic forfeiture provisions of the Waskey Act were impliedly repealed by the 1938 Amendment, such implied repeal would not affect the other and separate provisions of the Waskey Act dealing with the filing of proofs of labor and the presumption of non-performance arising from failure to file.

These three points will be discussed separately un-

der appropriate sub-heads as the first three propositions in this brief.

There are two other collateral matters involved. First is the matter of variance in and sufficiency of the description of the Snow Shoe Fraction claim (Case No. 5493); see Assignment of Error numbered XXVII (Page 79 Tr.) XXVIII (Page 80, Tr.) Exception No. 9 (Pages 131 to 133, Tr.) As described in the complaint and as staked on the ground (Page 3, Tr.) the Snow Shoe Fraction was supposed to cover ten acres of land 350 feet wide by 1500 feet long. The recitals of the adverse claim and proof disclosed that as now held, it, in fact, covers as vacant land only a small triangle containing approximately one-fourth of that area, or two and one-half acres. (Page 132, Tr.) The reason for the discrepancy lies in the fact that the boundaries of the claim as originally staked overlapped in large part certain prior locations known as the Miller Bench and Lulu and perhaps others, which then subsequently went forward to patent. The only vacant ground subject to appropriation by the Snow Shoe Fraction location at the time it was made is this small area of two and a half acres and the question appellant desires to raise by this point is whether, disregarding any technical matters of pleading, the location made in this manner can be sustained.

The last proposition urged by appellant is the ques-

tion of the propriety of allowing attorneys' fee under the circumstances. See Assignment numbered CXXX (Pages 85, Tr.) Exception No. 12, (Pages 133-4, Tr.) No allegation regarding or mention of attorney fees appears in either complaint (Pages 2 to 5 and 6 to 10, Tr.) No evidence was offered regarding attorneys' fees on the trial. (Page 133 Tr.) The Court, nevertheless, inserted of its own motion, in Paragraph 9 of the findings, recital that a "reasonable sum to be allowed the plaintiffs as attorneys' fee herein is the sum of \$500.00," and inserted said amount in the decree. Appellant contends that in order for attorneys' fees to be allowed the amount of the fee must be supported by pleadings and proof.

In fairness to Mr. Bell, the attorney who tried these cases in the District Court, the following statement should perhaps also be made. During the trial, which consumed some eight days, a large number of additional matters were raised and are referred to in the Assignments of Error. The writer has disregarded all such Assignments, and the matters supporting them, in preparing this record on appeal, not because they do not possess merit, because in the writer's opinion many of them do, but because as we view the record, their inclusion here is both unnecessary and undesirable. Aside from the two collateral matters of the sufficiency of the Snow Shoe Fraction location and the

propriety of allowing attorneys' fees, the controlling question involved here is the implied repeal of the Waskey Act. If the Waskey Act and all rights and presumptions arising under it were completely wiped off the books in 1938, as the Trial Court ruled, then such matters as the motion for mistrial and other errors which would merely result in a new trial become unimportant because, under the general doctrine of resumption of work, if applicable, the result of any second trial would inevitably be the same as the first. To make this clear, while there was a complete failure to do assessment work or to file proofs of labor evidencing it, during many of the years intervening between 1909 and 1939, and the propriety of the claimed improvements shown in some of the proofs of labor may be subject to question; (See for instance the brushcutting claimed for 1938-39, Page 117 Tr. and the stripping moss for 1939-40, Page 120 Tr.) it seems quite clear that work was resumed at least during the fiscal year July 1, 1940 to 1941. The development work claimed, during that year, prospect drill holes, (Page 122, Tr.) appears proper and sufficient in amount. Accordingly, if appellant's contentions regarding the implied repeal should be denied, it would not seem to her advantage to secure a reversal upon any other ground, because her case (apart of course from the questions of the sufficiency of the Snow Shoe location and the matter of attorneys' fees) is lost in any event and a new

trial would only result in added and needless expense. On the other hand if either of the appellant's contentions regarding the Waskey Act are sustained, then she has won her case, because as hereafter more fully appears there was a total failure to file proofs of labor during many years intervening between 1909 and 1938 (Exception No. 4, Pages 100-102 Tr.) and no attempt was made by appellees to show the performance of annual labor during such years, so that if the Waskey Act was not completely wiped out, appellant's motions for non-suit and directed verdict made at the close of all the testimony should have been granted. Also, since, as stated, there were so many years when no proofs of labor or suspension notices were filed at all, it seems unnecessary to devote time to a consideration of the legal sufficiency of some of the suspension notices or the eligibility of certain of the claimants therein to claim exemption (see 74 Fed. Supp. Pages 927 to 929, Points 18 to 26) or the sufficiency of the improvements claimed in certain of the proofs of labor to comply with the Statute. (74 Fed. Supp. p. 929) In other words, if we get to the point of determining that the Waskey Act is still in force, then there are so many years in which there has been a complete failure of performance that we do not have to concern ourselves with those years when there has been an attempt at performance, insufficient or otherwise.

APPELLANT'S FIRST PROPOSITION

(The Waskey Act was not repealed by the 1938 Amendment to the 1900 Law because the Amendment was not a new enactment on the subject.)

SUMMARY OF POINTS AND AUTHORITIES INVOLVED

I.

There is a strong presumption against implied repeals.

59 Corpus Juris, Title "Statutes", Sec. 510, Pages 905 to 908;

Crawford on Statutory Construction (1940) Sec. 309 and 310, Pages 629 to 631;

Posadas vs. National City Bank, 296 U. S. 497 on 503, 56 Supreme Court, 349 on 352;

State ex rel vs. Malheur County Court, 54 Oregon, 255 on 262 (101 Pacific 907)

II.

An amendatory Act which merely re-enacts without substantial change the provisions of a former law does not repeal an intermediate act which had amended, qualified or limited the first one, but the intermediate act will be deemed to remain in force and to amend or modify the new act in the same manner as it did the first.

50 American Jurisprudence, Title "Statutes", Sec. 563, Page 558;

Eddy vs. Kinkaid, 28 Oregon 537 on 562-3 (41 Pacific 157);

Small vs. Lutz (67 Pacific 421);

Bayless vs. Douglas County, (57 Oregon 301 on 304) 111 Pacific 384.

III.

Where a statute is amended "to read as follows" the provisions of the original law which are copied either word for word or in substance into the new enactment are not deemed re-enacted or a new expression on the subject but are considered to be a part of the former law and to have remained in force without change all along.

Sutherland on Statutory Construction (Horacks 3rd Edition) Sec. 1933, Pages 425 to 428;

59 Corpus Juris, Sec. 527, Page 925;

Posadas vs. National City Bank 296 U. S. 497 on 499 et seq. (56 Supreme Court Reporter 349);

Great Northern Railway Company vs. U. S. (CCA 8th) 155 Fed. 945 on 947 et seq.;

In re. Wilson (56 Pacific 2nd 733) 105 A. L. R. 367 on 375;

George v. Asheville, 80 Federal 2nd 50, 103 A. L. R. 568 on 577;

Noonan v. City of Portland, 161 Oregon 213 on 250 to 251 (88 Pacific 2nd, 808);

- Stingle v. Nevel, 9 Oregon 62;
 Eddy v. Kinkaid, 28 Oregon 537 on 562-3 (41 Pac. 157);
 Bayless v. Douglass County, 57 Oregon 301 on 304 (111 Pac. 384);
 Renshaw v. Lane County Court, 49 Oregon 526 on 529-30 (89 Pac. 147);
 State v. McGinnis, 56 Oregon 163 on 165 (108 Pac. 132);
 City of Woodburn v. Aplin, 64 Oregon 610 on 618-619 (131 Pac. 516);
 State v. Malheur Co. Court, 54 Oregon 255 on 262, (101 Pac. 907);
 State v. Cochran, 55 Oregon 157 on 166 (104 Pac. 419);
 State v. Schluer, 59 Oregon 18 on 41 (115 Pac. 1057);
 Rosa v. Bandon, 71 Oregon 510 on 513, (142 Pac. 339);
 5 Annotated Cases 203, 88 American State Reports, 276.

IV.

State v. Lightner does not conflict with the above rule.

State v. Lightner 77 Oregon 587, 152 Pacific 232.

ARGUMENT

Section 381, Title 48, U. S. Code Annotated, was

Section 26 of Chapter 786 of the Law of June 6th, 1900, making further provision for the government of Alaska, commonly known as the Alaska Act. (31 Statutes 329). The first clause of this Section reads, "The laws of the United States relating to mining claims, mineral locations, and rights incident thereto, are hereby extended to Alaska."

Then, in 1907, Section 384, Title 48, U. S. Code Annotated, commonly known as the Waskey Act, was enacted. (34 Statutes 1243) This act provided for the filing of proofs of labor and prescribed the contents thereof. It states, "Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, *but if such affidavits be not filed within the time fixed by this Section the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Section, as to performance of work and improvements, such claims shall become forfeited and open to location by others as if no location of the same had ever been made.*" The General Mining Laws of course permit the resumption of work after default in the performance of assessment work and before an adverse location, so that this last clause, providing as it did for an absolute forfeiture of the location upon failure to do the work for any year was held in *Thatcher v. Brown* (CAA 9th Cr.) 190 Fed.

708 on 711, to amend and modify Section 381 to that extent. This ruling was then confirmed in the later case of *Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co.*, (CCA 9th Cr., 210 Fed. 599 on 604.) Then in 1938 Congress amended Section 381 Title 48 U. S. C. A. (52 Statutes 588) This Section was amended "to read as follows" and then the full Section was set out, including the new matter desired to be inserted, which had to do with mining on or below tidewater lands. The clause, "The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are extended to the Territory of Alaska" was merely copied into the Amendatory Act from the original enactment without change. (See 74 Federal Supplement Page 921.)

Appellant contends that under such circumstances the Waskey Act was not impliedly repealed by the 1938 Amendment. In appellant's brief, submitted to Judge Pratt in the lower court, the citation from 50 American Jurisprudence, Page 558, Sec. 553, quoted at the top of Page 921, 74 Federal Supplement, was submitted. The reason for this rule is admirably and clearly stated in the case of *Allison v. Hatton*, 46 Oregon 370 on 372, 80 Pacific 101, as follows, "The rule is, that where a section of the Statute is amended so as to read 'as follows; and the section is then set forth with the changes intended to be made, *those portions of the old section that are merely copied into the Amendment without*

change are not to be considered as reenacted or as a new statement of the law, but are to be read as a part of the earlier statute, if in conflict with another law passed after the section amended and before the Amending Act, unless there is a clear manifestation of legislative intention to the contrary... In the absence of such an intention, it is the changes or additions incorporated in the section amended only, that are to be considered enacted. This doctrine has been several times applied by this Court and is supported by the authorities. (Citing cases)'' Judge Pratt refers in his opinion (74 Fed. Supp. 922) to Eddy v. Kinkaid (28 Oregon 537, 41 Pac. 156). We quote the following from that case. "But a sufficient answer to this contention is that the section of the Australian Ballot Law relied upon by the defendant is not a new legislative declaration, but is merely a reenactment of the provisions of the law that existed long prior to the creation of the Board of Railway Commissioners and therefore does not repeal by implication any provision of that Act, even if it is in conflict therewith: Endlich on Interpretation of Statutes, Sec. 195." To these cases could be added a long line of other Oregon decisions, announcing the same rule. See Bayless v. Douglas County, 57 Oregon 301 on 304 (111Pac. 384); Small v. Lutz, 41 Oregon 570 on 572, (67 Pac. 421); Renshaw v. Lane County Court 49 Oregon 526 on 529-30 (89 Pac. 147); State v. McGinnis, 56 Oregon 163 on 165 (108 Pac.

132); *Stingle v. Nevel*, 9 Oregon 62; *City of Woodburn v. Aplin*, 64 Oregon 610 on 618-19 (131 Pac. 516); *State v. Malheur Co. Court*, 54 Oregon 255 on 262, (101 Pac. 907); *State v. Cochran*, 55 Oregon 157 on 166 (104 Pac. 419); *State v. Schluer*, 59 Oregon 18 on 41 (115 Pac. 1057); *Rosa v. Bandon*, 71 Oregon 510 on 513.

Space does not permit extended quotations from all of these cases but all of them will be found to expressly assert and reaffirm the rule herein contended for. The following brief quotations should suffice to establish this, "Statutes are often reenacted, in which case they are not considered as new laws, but relate back to the former law on the same subject as against intermediate legislation (59 Oregon 41)." "The contention is that the Acts of 1899 and 1901 with reference to procedure on appeal operated to repeal by implication the provision of the statute making surety companies qualified sureties in undertakings on appeal. A sufficient answer to this position is that the provisions in the Act amending Section 537, in reference to the qualifications of sureties on appeal bonds, is not a new legislative declaration on the subject, but merely a reenactment of the law as it stood long prior to the Act authorizing surety companies to do business in the state and is therefore not in conflict with the later Act and does not operate to repeal it." (41 Oregon 572). "The amendment of the Charter by the

legal voters not having made any alteration in that part of the enactment on February 7, 1899, relating to the number of sureties on a bond executed in the city of Woodburn, the parts of the earlier Charter which were copied without change into the amendment which was adopted April 27, 1909, *are not to be regarded as a new statement of the law*, but are to be read as a portion of the earlier Charter, and hence subject to and controlled by the provisions of Section 6 of the Act of February 20, 1899, authorizing a surety company to execute to a municipal corporation a valid bond. (Citing many cases)." (64 Oregon 618)

It will be noted from the above authorities that the reason underlying the rule that the mere copying of a provision of a former statute into an amendatory act will not affect an intervening statute which has modified or superceded a portion of the original law is that under such circumstances the copied material is not deemed as a new declaration by the legislature or other governing body upon the subject, but is treated as merely a continuation of the former law, without change. In other words, as to such copied portion, the law remains the same as it was all along, and if that law has been modified or superceded by any intermediate enactment, it still remains modified and superceded in the same way it was before. Stating it another way, such an amendment and copying is deemed to indicate an

intention merely to reaffirm the law as it was before, whatever that may have been, rather than to change the pre-existing law.

Judge Pratt disregards these Oregon cases with the following statement. "While a few of the Oregon cases adhered to the intermediate amendment rule, the Supreme Court of Oregon definitely refused to follow the rule in the case of *State ex rel. Brady v. Lightner*, 1915 77 Oregon 587, 152 Pacific 232, 233." He then goes on to discuss this case and concludes, "This case involves the same situation which confronts us in the present case and it, in effect, overrules all prior Oregon cases to the contrary. (77 Fed. Supp. 922)" It is respectfully submitted that the Judge has misconstrued the decision in *State v. Lightner*. In the first place, it may be pointed out that there was in existence at that time a long line of earlier case uniformly announcing the rule as above set out and if the Court had intended to make such a drastic change in the law it seems extremely likely that some mention of the earlier cases and a statement to that effect would be found in the decision. Nothing of that kind of course appears. In *State v. Lightner* we are not concerned with an earlier act, then a separate intermediate act modifying the earlier statute in some particulars and then a later amendment of the original act, copying and carrying forward certain provisions of it into the Amendatory Statute, but

rather two amendments to the same act adopted at the same session of the legislature. The first amendatory act, which took effect at 8:30 a. m. on February 23, 1915 (78 Oregon 588) contained certain provisions which were omitted from the second amendment which took effect at 9:55 a. m. on the same date, or an hour and twenty-five minutes later. Both acts purported to amend the same section of the statute and were complete in themselves. The Oregon Constitutions provides that in amending or revising an act, the act as revised or amended shall be set forth at full length. The Oregon Supreme Court accordingly in discussing the second act, which it concluded was the last expression of the legislature and so the law, states, "If it can be made larger by a proviso which the Court selects for itself out of a previous amendment upon the same subject, it is not set forth at length, and the constitutional provision will be violated. If the constitution is given any effect, Section 6313 as last amended is all of Section 6313 as it now stands. There can be but one Section 6313 of Lord's Oregon Laws. *It might have been different if the first amendment, instead of being an attempted amendment of Sec. 6313, had been an original law without reference to an amendment, but it is not* * * * *We do not have to deal, necessarily, with the question of a repeal by implication. The later act expressly amends the section as it formerly existed and repeals a part of the former statute, and must be declared*

to be the law." The distinction between that case and the one involved here is, of course, obvious. If the Waskey Act, instead of being enacted as a separate statute, had been enacted as an amendment to Sec. 381, and Congress then at a later date again amended the Section restoring the law to its former condition and eliminating the provisions of the Waskey Act, a situation similar to that in *State v. Lightner* would have been presented, but that is of course not the case. The Waskey Act was a separate enactment modifying and superceding part of the original law, and under the express rule as announced in the authorities previously discussed, a mere amendment of the original statute copying its provisions into the later act does not evidence any intention to change or supercede the intermediate act which had modified the first, but the law with its modifications was deemed to continue in force without change.

That the Oregon Supreme Court did not consider the earlier cases as having been overruled by *State v. Lightner* is amply established by the very recent Oregon case of *Noonan v. City of Portland*, (161 Oregon 213 on 250 to 251, 88 Pacific 2nd 808). "In the absence of a clear indication to the contrary, a statute which is incorporated within an amendatory act without any substantial or material change in its phraseology *takes its antiquity from its original enactment and is neither deemed repealed nor reenacted by being incorporated in*

the amendatory act.

The principle is better stated in *State v. McGinnis*, 56 Oregon 163, 108 Pacific 132, from which we quote:

“Whatever the rule may be in other jurisdictions, it is settled in this State that where a section of an act is amended ‘so as to read as follows,’ and the later law sets forth the changes contemplated, the parts of the old section that are incorporated in the new are not to be treated as having been repealed or re-enacted, but are to be considered as portions of the original statute, unless there is a clear declaration to the contrary, in the absence of which it is only the additions that have been made to the original section that are to be regarded as a new enactment.’

See to like effect *Brun v. Lazzell*, 172 Mr. 314, 191 Atl. 240, 109 A. L. R. 1453; *In Re Wilson’s Estate*, 102 Mont. 178, 56 P. (2nd) 733, 105 A. L. R. 367; *Duggan v. Ogden*, 278 Mass. 432, 180 N. E. 301, 82 A. L. R. 765.”

In addition to quoting and citing from the earlier decision of *State v. McGinnis*, previously mentioned as among the cases supporting (what Judge Pratt calls) the intermediate amendment rule, the Court will note a number of outside cases, all of which are reported in A. L. R. We direct attention particularly to *In Re Wilson’s Estate* (Mont.) 56 P. (2nd) 733, 105 A. L.

R. 367.) We quote from page 375:

“And it is a rule of statutory construction, universally applied, that if a section of a statute be amended, such part of the old as is retained and carried forward into the amended section *is not new* but is construed to have been the law at all times since it was first enacted.”

Another case stating the general rule is *George v. Asheville* (CCA 4th Cr. 80 Fed. (2nd) 50, 103 A. L. R. 568) which is cited in support of the text in 50 American Jurisprudence 558. We quote from 577 of 103 A. L. R.: “And ‘insofar as a later law is merely a re-enactment of an earlier one, it will not repeal an intermediate act which qualifies or limits the first one, but such intermediate act will remain in force and qualify or modify the new act in the same manner as it did the first.’ 59 CJ 926, 927”

Judge Pratt points out that Oregon and some other States have constitutional provisions requiring that no law should be amended by reference to the title only, but that the law should be re-enacted and inserted at length in the new act. He then continues, “The part these constitutional provisions played in making said intermediate amendment rule is reflected in the cases on the subject. As Congress never had such limitations upon it, the rule cannot be of assistance in interpreting the intention of Congress as to an act.” (74 Fed. Supp.

921) And, "construction of Acts of Congress never were aided by the intermediate amendment rule." (923) this is, we submit, a misconception not at all borne out by the authorities. *Posadas v. National City Bank of New York*, 206 U. S. 497, 56 Supreme Court 349, is one of the leading cases in the United States announcing the rule. Here is a case where the Supreme Court of the United States is construing an act of Congress. We quote from page 353 of the Supreme Court Reports (505 of the U. S.):

"The amendment is made in a well approved form - a form which, indeed, many of the States compel by constitutional provision - namely, by repeating the language of the original section, with the additions to which we have heretofore called attention. Unless the contrary plainly appear, the employment of such form of amendment is simply to serve the causes of convenience and certainty, that is to say, that by carrying the full text forward, the task of searching out and bringing together the various fragments which go to make up the completed whole, after specific eliminations or additions by amendment, is rendered unnecessary; and possible doubt as to the precise terms of the law as amended is avoided. Or, as Chief Judge Denio said in *Eli, et al, v. Holden*, *supra*; 'In short, we attribute no effect to the plan of dovetailing the amendment into the original section, except the

one above suggested, of preserving a harmonious text, so that when future additions shall be published, the scattered members shall easily adjust themselves to each other.'

"It follows that such parts of the original section 25 as were copied into the amended section *were not thereby repealed and immediately re-enacted, but continued, uninterruptedly, to be the law after the amendment precisely as they were before.*"

To the same effect is *Great Northern Railway Co. v. United States*, C. C. A., 8th Cr. 155 Fed. 945 on Pages 947 et seq. This case contains an elaborate discussion of the rule and the reasons for it. We quote from Page 948:

"In the absence of a constitutional restriction—and there is none in the constitution of the United States, the amendment of existing statutes may be accomplished by either of these ways" (by amendment merely referring to the title, or by setting out the full section as amended 'so as to read as follows') "*and they have been employed interchangeably by Congress.*

Generally speaking, where a statute is amended 'so as to read as follows' or is re-enacted with changes, or is in terms repealed and simultaneously

re-enacted with changes, the amendatory or re-enacting act becomes a substitute for the original which then ceases to have the force and effect of an independent enactment; but this does not mean that the original is abrogated for all purposes, or that everything in the later statute is to be regarded as if first enacted therein. On the contrary, the better and prevailing rule is that so much of the original as is repeated in the later statute without substantial change is affirmed and continued in force without interruption, that so much as is omitted is repealed, and that any substantial change in other portions, as also any matter which is entirely new, is operative as new legislation."

In other words, while there is no constitutional restriction upon Congress requiring it to make amendments in this fashion, when it does, which is frequently the case, amend a statute by setting forth the full text "so as to read as follows" the same rules of construction apply to Congressional acts as to any other.

It may be noted in passing that Judge Pratt (74 Fed. Supp. 921) cites Sec. 230 of Lewis's Sutherland on Statutory Construction, (2nd Ed.) on the point that this method of amendment is frequently required by constitutional provision. It is noted that Sutherland supports the rule for which we are contending, Sec. 237 of the 2nd Edition, is quoted on page 948 of 155 Fed-

eral, and the following is from the 3rd Edition of Lewis on Statutory Construction by Horack:

“Provisions of the original act or section which are repeated in the body of the amendment, either in the same or equivalent words, are considered a continuation of the original law. This rule of interpretation is applicable even though the original act or section is expressly declared to be repealed. In some states this rule of interpretation has been enacted into law. The provisions of the original act or section is expressly declared to be repealed. held to have been the law since they were first enacted, and the provisions introduced by the amendment are considered to have been enacted at the time the amendment took effect.” (Volume I, Sec. 1933, Page 425)

As far as the writer can determine, this rule is of ancient origin and appears to have been almost universally adhered to. Attention is directed to the fact that the quotation from 50 American Jurisprudence Page 558 is supported by two annotations, 88 American State Reports, 276 and 5 Annotated Cases 203. The statement in 5 Annotated Cases 203 is as follows:

“A later law which is merely a re-enactment of a former law does not repeal an intermediate act which has qualified and limited the first one, but the intermediate act will be deemed to remain in

force and qualify or modify the new act in the same manner as it did the first."

The American State Reports annotation uses substantially the same language.

Based upon the foregoing authorities we submit that it appears conclusively that Congress when it passed the 1938 amendment to the Act of 1900 evidenced no intention to and did not repeal the intervening Waskey Act which modified and limited in part the 1900 Statute, but instead, evidenced an intention to continue the law exactly as it was, excepting only for the changes expressly contemplated by the amendment which were "as to mining on and below tidewater land." In other words, by using this form of amendment the intention was to continue the law in its then condition with the intermediate Waskey Act in full force.

APPELLANT'S SECOND PROPOSITION

(EVEN IF THE WASKEY ACT HAD BEEN IMPLIEDLY REPEALED IN 1938, THIS WOULD NOT REVIVE LOCATIONS THAT HAD BEEN FORFEITED FOR FAILURE TO DO ANNUAL ASSESSMENT WORK WHILE IT WAS IN FORCE.)

SUMMARY OF POINTS AND AUTHORITIES

I.

The repeal of a statute will not operate to impair rights vested under it or to revive rights lost or taken away under the repealed statute.

59 Corpus Juris, Title "Statutes" Sec. 722 Page 1186 and Sec. 723, Page 1187;

Perkins Manufacturing Co. v. Clinton Construction Co. 295 Pacific 1, on Page 4.

ARGUMENT

This point is considered by the writer to be of much importance, although in view of the length to which this brief has grown, we will not devote too much space to it. Whether impliedly repealed or not in 1938, the Waskey Act was unquestionably the law of Alaska, very much in effect, from its passage in 1907 to its alleged repeal by implication in 1938, *or a period of 31 years*. The claims involved in these cases (the L Association and Snow Shoe Fraction) were located in 1908. From 1908 to 1938, at least, or a period of thirty years, the matter of performance of assessment work on these claims, and the effect of non-performance, were governed by the Waskey Act. Now, under the express terms of the Waskey Act: "Upon failure of the owner or locator of any such claim to comply with

the provisions of this act as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made." In other words, under the express provision of the Act, forfeiture is automatic. If the work is not done the location is gone.

Let us try to make our position clear. Assuming that the Waskey Act was impliedly repealed in May 1938, then upon failure to do the annual assessment work for the fiscal year ending at 12 o'clock meridian July 1st, 1938, or any subsequent year, the locator or owner of the claim might, by resuming work, before an adverse location, prevent a forfeiture (as in Oregon, and elsewhere) by virtue of the general mining laws. *But* if he failed to do the assessment work during any year prior to and including 1937 while the Waskey Act was in force, then under the express terms of the Act itself the claim was forfeited and void to the same extent as if no location had ever been made. In other words, the location became absolutely dead and no subsequent implied repeal of the Waskey Act or resumption of work thereafter could ever resurrect it or breathe life into it; that location is gone for good.

By the same token, even if we accept Judge Pratt's and appellee's theory that the clause of the 1938 Amendment, making the General Mining Laws applicable to Alaska, brought about the implied repeal of

the portion of the Waskey Act, which provides for the filing of proofs of labor and the effect of failure to file (something which we by no means concede, as hereafter appears, even if it effected such a repeal so far as the automatic forfeiture is concerned, so as to permit a resumption of work) it does not follow that we are to disregard these provisions of the Act entirely. Whether there was any provision for filing proofs of labor in Alaska after 1938 or not, there most certainly was a provision from 1908 to 1937. From 1908 to 1937 appellees and their predecessors were required to file proofs of labor and if they failed to do so *the presumption was that they did not do the work.* (See the discussion under appellant's third proposition.)

Again we concede that if the Waskey Act was impliedly repealed in 1938, and this provision fell with it, a failure to file proof of labor for 1938 or any subsequent year would bring about no adverse presumption, *but* no subsequent implied repeal could in any way change or affect the rights and liabilities which became fixed and vested in prior years. Whether required to file a proof of labor for years subsequent to 1938 or not, appellees were undoubtedly required so to file in prior years and their failure to do so, *has created a continuing presumption that the work was not done during those years.*

The foregoing seems so clear as hardly to require any

citation of authority. "A brief check of the books fully confirms this proposition. We first direct attention to 59 Corpus Juris, Title "Statutes", Section 722, Page 1186:

"However, the repeal of the statute will not operate to impair rights vested under it, or *to revive rights lost or taken away under the repealed statute*, or to affect acts performed or suits commenced, prosecuted and concluded under the former law.'

See also the California case of Perkins Manufacturing Co. v. Clinton Construction Co. 295 Pacific 1, on p. 4:

"Appellant therefore contends that since the penalty has been removed and since it has now complied with the provisions of the 1927 act, it may maintain this action. The result reached by appellant is non sequitur. In the first place the whole argument is based upon the premise that the penalties imposed by the 1915 act merely served to render the contract unenforceable and not void but this premise as we have seen is incorrect. The contract herein involved was void as to appellant when entered into and performed. The rule in reference to repeal of statutes imposing penalties would seem to have no application to a contract rendered void by statute. *In other words, we are*

of the opinion that the repeal of a penalty rendering a contract void would not serve to revive the void contract."

We therefore submit that appellees cannot prevail here, whether the Waskey Act was impliedly repealed in 1938 or not.

APPELLANT'S THIRD POINT

(EXTENT OF IMPLIED REPEAL)

POINTS AND AUTHORITIES

I.

Where two acts are repugnant to or inconsistent with each other, the former will be deemed impliedly repealed by the latter to the extent, and only to the extent, of the inconsistency.

59 C. J. Title "Statutes", Sec. 517 p. 916.

ARGUMENT

It follows almost as of course from the rule that all presumptions are against an implied repeal and that two acts shall be construed so as to sustain both, if possible, (See 59 C. J. Section 518, Title Statutes p. 917-918 and authorities cited under Point I, Appellant's First Proposition, p. 12 supra) that where two acts are repugnant to or inconsistent with each other, the

former will be deemed impliedly repealed by the latter to the extent, and only to the extent, of the inconsistency. We quote the following from 59 C. J. Title Statutes, Sec. 517, p. 916:

“Where there is a sufficient repugnancy or inconsistency between two statutes or parts of two statutes to effect a repeal by implication, the earlier statute is impliedly repealed to, and only to, the extent of the conflict, repugnancy or inconsistency.”

An examination of the Waskey Act (Title 48, Sec. 384, U. S. C. A.) discloses at once that it covers two main propositions. First, it provides for the filing of proofs of labor and their contents and the presumption of performance arising from filing and non-performance from failure to file; and, second, it provides that upon failure to do the work the claim becomes automatically forfeited. It was this second phase of the act (the forfeiture provision) that the Circuit Court of Appeals in *Thatcher v. Brown*, 190 Fed. 708, held inconsistent with and to impliedly repeal the resumption of work clause in the general mining laws. We quote from p. 711:

“Both acts expressly require \$100 worth of work or improvements to be done or made on or for the benefit of each claim during each year but the consequences of a failure to complete such work or

improvements within the year are differently declared and such differences are irreconcilable. In the earlier act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year provided there has been no other location in the meanwhile. By the later act no such permission is accorded and there is therein an express declaration that such failure works a forfeiture of the claim. *To that extent the prior law, so far as it affects claims in Alaska was necessarily repealed by the later one."*

There is no provision in the general federal mining laws made applicable to Alaska by 48 U. S. C. A., Sec. 381, which provides for the filing of affidavits showing the performance of annual labor. Neither is there anything in such laws prohibiting the filing of such affidavits, so that the matter is left entirely to local legislation. See Lindley on Mines, 3rd. Ed. Vol. 1, Sec. 250, p. 546:

"Many of the states and territories, prior to their admission as states, have enacted codes more or less comprehensive, supplementing Congressional laws, while others have but few provisions. In the appendix will be found the legislation of this character now in force in each state."

"That a correct understanding of the general scope of the existing state and territorial legisla-

tion may be gleaned, we enumerate the subjects covered by such laws, indicating which states and territories have legislated upon the subject, *first considering those concerning which such legislation is unquestionably proper within reasonable limits.*"

Under sub-division 14 of this class (p. 560) is the following:

"(14) Authorizing the recording of affidavits of performance of annual labor."

And in Volume 2 of the same work, Section 636, pp. 1580 to 1585, is found a detailed discussion of the state laws providing for the filing of proofs of annual labor. Note on page 1581 that Alaska's Waskey Act is cited as placing Alaska in the same category as the others:

"This class of legislation is found in California, Colorado, Idaho * * * and has been provided by the Federal Government for Alaska (citing 34 Stat. at Large, Sec. 1243, - the Waskey Act.)."

Oregon for instance now has a proof of labor statute passed in 1939 (Sec. 108-314 and 108-315 O. C. L. A.) which closely follows the similar provisions of the Waskey Act. The prima facie presumptions arising from recording the proof of labor or failure to record it (Sec. 108-315) are identical. Yet in Oregon, as in many of the other states referred to by Lindley as having similar legislation, the doctrine of resumption

of work is in full force and effect. There is no provision for automatic forfeiture upon failure to do the work such as is found in the later clauses of the Waskey Act.

We have stressed this phase of the matter in order to show that the two aspects of the Waskey Act, that is the filing of proofs of labor and the presumptions from the filing or failure to file the same and the automatic forfeiture arising from non-performance are entirely severable and separate. One aspect of the Waskey Act, the automatic forfeiture provision, is inconsistent with the resumption of work doctrine of the general mining laws and, as held in *Thatcher v. Brown*, superceded that doctrine so far as it applied to Alaska, but the other aspect of the Waskey Act, the filing of proofs of annual labor and the presumptions arising in connection therewith are in no way inconsistent with the general mining laws and in no way dependent upon the forfeiture provision, as is shown by the fact that, as hereabove pointed out, several states in addition to Alaska, have proof of labor statutes substantially identical to Alaska's, with similar presumptions arising therefrom, where the doctrine of resumption of work is also recognized. We submit therefore that even if the 1938 amendment, making the general mining laws applicable to Alaska was held to repeal the forfeiture clause of the Waskey Act there is absolutely nothing

upon which to base the contention that it also repealed the proof of labor provisions of that Act.

The foregoing appears to be in accord with Judge Pratt's views the first time he held the Waskey Act to be impliedly repealed. See *Koprivica v. Sather*, 10 Alaska Reports, 593 on 597-8:

"Consequently when the act of May 31, 1938 repeated the wording of Section 26 as passed June 6th, 1900, and left out any reference to the Waskey Act, it seems clear that Congress intended to make the general mining laws as they existed in 1938 control in Alaska over the Waskey Act *as to matters in which the two laws conflict*, i. e., as to the resumption of work after the failure to do annual labor. *The other provisions of the Waskey Act still remain in full force.*"

This time, however, as we understand his decision, Judge Pratt seeks to overcome the effect of this reasoning in two ways. First, he says that the word *claimant* as used in the clause of the Waskey Act, which provides: "But if such affidavit be not filed within the time fixed in this act the burden of proof shall be upon the *claimant* to establish the performance of such annual work and improvements," means the applicant for patent in the Land Office. (See 74 Fed. Supp. pp. 925-6) It is submitted that the fallacy of this reasoning will be at once apparent upon a little reflection.

The Waskey Act has nothing whatever to do with the proceedings in the Land Office. It deals with annual assessment work and proofs of labor evidencing the same upon unpatented mining claims. The applicant in the Land Office may, or may not, be the claimant seeking to sustain the validity of the earlier location, depending upon whether the elder or junior locator applies for patent. In this case the appellant Lowe, owner of the junior locations, applied for patent. Judge Pratt's construction would place the burden upon her to show that annual labor was not done, but under the former provisions of the Act, the affidavit if timely and properly filed, "shall be prima facie evidence of the performance of the work". So, under Judge Pratt's construction, this is a case of "heads I win, tails you lose," and the burden would be upon the "claimant" here, the appellant Miss Lowe, to show that the work was not done, whether any affidavit was filed or not. In other words, the statute means nothing. On the other hand, if, instead of the junior locator applying for patent, the holder of the elder location applies (in this case the appellees) and the junior locator, the appellant Miss Lowe had adversed, then since the appellees would be the applicants in the Land Office, they would be the claimants according to Judge Pratt and the burden would be cast upon them to show the performance of the work if no proofs of labor were filed. So the burden of proof would shift back and forth between

the elder and junior locators, depending upon who happened to be the applicant for patent in the Land Office. This hardly seems to make sense either. Lastly, by construing the word claimant to mean applicant in the Land Office, Judge Pratt would limit the effect of the Waskey Act to suits or actions in support of adverse claims. That is, to cases where one of the parties had applied for patent in the Land Office, and the other was contesting his rights. But it may be pointed out that at least half and perhaps more than half of the litigation involving possessory rights to mining ground under conflicting locations is in cases where neither party has applied for patent. The Waskey Act is one of general application and there is certainly nothing in its wording that would justify an inference that it does not apply to all types of contests, yet according to Judge Pratt's construction the application of this provision would be limited to cases where one party or the other was "claimant" or applicant in the Land Office.

We submit, without further discussion, that the word "claimant" as used in the statute most obviously means the party claiming under the location for which the proof of labor is filed. The term "claimant" is commonly used in mining parlance to designate such party. It was used in this sense in all of the suspension acts filed during the depression years and in the moratoriums that followed our entry into World War II, including

the moratorium in effect for 1948. (Public Law 665, 80th Congress, Chap. 494, 2nd Session, Approved June 17, 1948.)

Judge Pratt's second contention on this point, if we understand him right, is that the provisions of the Waskey Act, providing for the filing of proofs of labor and the presumptions arising in connection with the filing of or failure to file the same, are inconsistent with the general mining laws and hence are impliedly repealed when the general mining laws were, as he states it, "again put forward" in 1938. (See 74 Fed. Supp. on 921 and 925) Such a contention is, of course, entirely at variance with the ideas of Lindley on the subject and it should be pointed out that if such a contention were sustained, not only would the Waskey Act be repealed, but the similar statutes in Idaho, New Mexico, and, since 1939, Oregon (see Sec. 108-315 O. C. L. A.) would also be nullified, because of course the Federal mining laws have always been applicable in such States and it fundamental that legislation enacted by the States contrary to the Federal mining laws is ineffective.

It is submitted that the Trial Court's fundamental error on this point lies in his conclusion that the general mining laws "provided in effect * * * (2) that the owner of a validly located mining claim *was presumed to have done the annual labor* and the burden of prov-

ing the contrary, was upon any person asserting the same." (74 Fed. Supp. 920) It is submitted that while the second clause of this statement is undoubtedly correct in that the burden of proving the contrary is undoubtedly on the party so asserting, the first clause, which we have italicized, to the effect that the owner is presumed to have done the annual labor, is decidedly not correct, and finds no support in the authorities. The law does not presume that the owner of a claim has done the annual labor. There is no presumption on the subject one way or the other. Of course, as stated by the authorities cited in the Court's opinion, forfeiture is an affirmative defense and, like any other affirmative defense, the burden is upon the party asserting it to prove it. This ordinarily entails proving that the annual labor was not done. But this is a long way from saying that the law presumes it was done. For instance, in Case No. 5493, the second allegation in plaintiff's complaint (p. 2, Tr.) is that the plaintiff is a corporation organized under the laws of the State of Maine. If this allegation had been denied by the answer, the burden would be upon the plaintiff, since it had the affirmative of that issue, to prove that it was a Maine corporation, but the law would not *presume* that it was or was not. The law entertains no presumptions one way or the other, it simply says that the burden of proof is on the party having the affirmative of a particular issue. This

same fallacy of reasoning seems to be back of the following statement on page 926 of 74 Federal Supplement:

“But even if the word “claimant” be interpreted to mean a party in court, affirmatively claiming that the annual labor was *one* (done) upon his claim, the Waskey Act would not place the burden of proof upon the plaintiffs in this case, because they never got to the point where they were claimants. As the plaintiffs showed valid locations of their mining claims, *the law raised the presumption that they did the annual labor upon the claims*. This presumption continued until the defendant made a prima facie showing that the annual labor was not done. Until such showing was made, and it never was made in this case, the plaintiffs were not required to say anything about annual labor and therefore were never to be classified as “claimants.”

This statement is, we believe, fallacious and if followed would largely if not entirely nullify the presumption arising from failure to file provided for in the Waskey Act and similar statutes. As previously shown, the law does not presume that the annual labor was done on a mining claim, any more than it presumes the existence or non-existence of any other fact in issue. It simply says that if such a fact is alleged, the burden is

upon the party alleging it to prove it. That proof can ordinarily be accomplished in one of two ways. First, either by affirmative testimony to the effect that the annual labor was not done, or, secondly, by a showing of facts from which the law will presume it was not done, or which will shift the burden of proof upon the adverse party to show that it was done. Such is the effect of the Waskey Act and similar laws. Upon checking the codes in the mining states, it would appear that the statute most closely approximating this phase of the Waskey Act is the New Mexico Proof of Labor law. Some of the states, such as Idaho, and now Oregon, state in substance:

"The failure to file such affidavit within said time will be considered prima facie evidence that such labor has not been done."

The New Mexico statute (see 89 Pacific, Page 287 and Vol. 3, Lindley on Mines, 3rd Ed., page 2514) states:

"The failure to make and file such affidavit as herein provided * * * throws the burden of proof upon the owner or owners of such claim to show that such work has been done according to law."

At the time the Waskey Act was adopted in Alaska (March 2nd, 1907) there were apparently only two states, New Mexico and Idaho, who had this kind of law. Since the Idaho Statute, as above mentioned is

different, the conclusion seems inescapable that the Waskey Act was copied from New Mexico. This conclusion seems indisputable when the substantially identical wording of the statutes is considered, together with the fact that there was apparently no other law to be used as a guide. It may or may not also be significant to note that just a few days before the passage of the Waskey Act (on February 27, 1907) the Supreme Court of New Mexico, in the case of *Upton v. Santa Rita Mining Co.*, (14 New Mexico 96, 89 Pacific 275 on p. 287 et seq.) construed the New Mexico Act and held that it shifted the burden of proof precisely as we are contending in the case of the Waskey Act:

“This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines (2nd Ed) 636), apparently the only jurisdictions having such a law. As is said by the very thorough author: ‘Ordinarily, the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico, where there is a failure to file the proof of annual labor, it would seem that this rule is modified and the burden is shifted. We cannot see any objection to this class of state legislation. The several states have a right to define the nature, degree, and effect of evidence within reasonable lines, and we do not think these provisions unreasonable.’

"In this case the proof shows that the holder of the Pinder claim made and filed an alleged proof of labor for 1897. But this, when tendered in evidence, was, upon objection, rejected by the Court as not made in conformity with section 2315, Rev. St. U. S. (U. S. Comp. St. 1901, p. 1421). A comparison of it with the statute convinces us that the court below was correct in so holding. Indeed, that ruling is not questioned here. In legal effect, therefore, there was a failure by the owner of the claim to make and file the statutory proof, and this under the statute, threw upon it, and not upon plaintiff, the burden of proving that 'such work had been done according to law' * * * Had the defendant complied with the statute as to making its proof of labor, it would probably have been entitled to this instruction; but its failure to take this very simple precaution for the protection of its rights *imposed upon it*, and not upon its adversary, the burden of proof." (278-8)

It is therefore submitted that when the appellant proved or offered to prove, as was done in this case, that no proofs of labor or suspension notices were filed for a large number of the years intervening between the location of the claims in 1908 and 1938, under the provisions of the Waskey Act, the burden of proving that the annual labor had in fact been done during such

years, would rest upon the appellees. Since the appellees failed to offer any proof upon this point (see Exception No. 4, pp. 100 to 102, Tr.) appellant's motions for directed verdict etc. should have been sustained.

APPELLANT'S FOURTH PROPOSITION

(VARIANCE IN AND SUFFICIENCY OF SNOW SHOE FRACTION DESCRIPTION)

SUMMARY OF POINTS AND AUTHORITIES

I.

Current rulings do not permit laying the lines of a placer claim as distinguished from a quartz location over ground covered by prior locations.

Lindley on Mines, (3rd Ed) Volume 2, Section 448B,
pp. 1055 to 1058;

Stenfield v. Espe (CCA 9th Cr.) 171 Fed. 825 on
827 to 829.

II.

Such a practice was never permitted on unsurveyed lands.

Lindley on Mines, 3rd Ed. p. 1056

ARGUMENT

As mentioned in the statement of the case, the Snow Shoe Fraction claim as set out in the complaint (Case

No. 5493) p. 3, Tr. of R., is alleged to cover a rectangular area of 350 feet by 1500 feet, containing approximately 10 acres and marked by four stakes, one at each of the four corners. (pp. 131-2, Tr.) As so located and staked, the Snow Shoe Fraction claim overlapped in large part certain prior locations known as the Miller Bench and Luloo and perhaps others, leaving the only vacant ground subject to appropriation by the Snow Shoe Fraction a small triangle containing approximately two and one-half acres. No subsequent amendment or re-staking of the Snow Shoe claim was claimed or shown. (p. 132 Tr.) The question is whether the Snow Shoe Fraction, under such circumstances, can be sustained as a valid location on this remaining $2\frac{1}{2}$ acres. It is submitted that it cannot. As stated in Lindley on Mines, 3rd Edition, Section 448 B, pp. 1055 to 1058, at one time the Land Office showed a disposition to allow the locator of a placer claim to locate by legal subdivisions, excepting such portions as had been previously segregated by prior locations. On page 1056 it is stated: "This rule was held, however, to have no application to placer claims upon unsurveyed public lands." Of course the public surveys have not been extended to the Territory of Alaska. Mr. Lindley continues: "The attitude of the land department as announced in the Snow Shoe placer claim case, discourages if not inhibits the laying of the lines of a placer claim over prior claims." In any event, this Court has, in the case of Stenfield v.

Espe, 171 Fed. 825 on 828, expressly ruled that the boundaries of a placer claim, as distinguished from a quartz location, cannot be laid over prior claims. This case would appear to settle the matter and it is submitted without further discussion that the Snow Shoe Fraction location cannot be sustained. We stress again that the Snow Shoe Fraction location as now claimed and described in the findings and decree was never located or staked. What was located was an area some four times as large and of an entirely different shape, some three quarters of which was not subject to appropriation at all.

APPELLANT'S FIFTH PROPOSITION

(PROPRIETY OF ALLOWING ATTORNEY'S FEES)

ARGUMENT

As set out in the statement of the case, there is no allegation in either complaint regarding attorney's fees and no testimony or proof was offered upon the trial. The Trial Judge, nevertheless, of his own motion, inserted in the findings the recital to the effect that a reasonable sum to be allowed the plaintiff as attorney's fees was \$500.00 and caused judgment for that amount, on account of attorney's fees, to be inserted in the decree. It is the appellant's contention that such an allowance was entirely improper under the circumstances and that

in order to be allowed, an award of attorney's fees must be supported by appropriate pleadings and proof, the same as any other fact. It is observed, on referring to the Alaska Code, that the provision for allowing attorney's fees was last added to the Alaska Statute by Chapter 84, p. 220 of the Laws of Alaska of 1947, which added to the existing cost statute the words: "And a reasonable attorney's fee to be fixed by the Court." It is further noted that Section 4065, Compiled Laws of Alaska for 1933, contained this clause and it was subsequently deleted by the Laws of 1937, Chapter 58, p. 128. The writer cannot find where this attorney fee clause has ever been construed by this Court or any reported decision of the Alaska district courts. The provision, however, seems very similar to the provisions allowing attorney's fees in mechanics lien and condemnation cases. Such being the case, we will refer for our authority to the Oregon cases dealing with such attorney's fees, since it is our understanding that Oregon authorities are considered of quite persuasive force in Alaska, due to the similarity of the codes of the two jurisdictions. In *State v. Ganong*, 93 Oregon 440, the majority opinion commencing at p. 456 holds squarely that attorney's fees, to be allowable, must be alleged and proved. (184 Pacific on 237 et seq.) This was a condemnation case. To the same effect, see *Columbia River Door Co. v. Todd*, 90 Oregon 147 on 152 et seq. (175 Pac. 443) and *Edwards v. Wirtz*, 167 Oregon

625 on 639 (118 Pac. 2nd. 114) These last two cases were lien foreclosures. As is pointed out by these authorities, particularly the Ganong case, unless the amount of attorney's fees is alleged and proved, there is no way for the adverse party to have his day in court on this issue. The court would otherwise fix the fee from his own knowledge without evidence; in other words, act as sole witness and then pass on his own testimony, without any means being afforded to the losing party to be heard upon or secure a review regarding the amount of any such fees, which, as in this case, can, if the judge feels so inclined, be fixed at quite a substantial sum.

Respectfully submitted.

HAROLD BANTA,

Hallock, Donald, Banta & Silven

Attorneys for Appellant

No. 11,953

IN THE

United States Court of Appeals
For the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING REFINING AND
MINING COMPANY, a corporation, FIRST
NATIONAL BANK OF FAIRBANKS, Exec-
utor of the Estate of Gustaf Soder-
blom, deceased, and WALTER JENSEN,

Appellees.

BRIEF FOR APPELLEES.

SOUTHALL R. PFUND,

Standard Oil Building, San Francisco 4, California,

CHARLES J. CLASBY,

Fairbanks, Alaska,

Attorneys for Appellees.

PILLSBURY, MADISON & SUTRO,

ALLAN R. MOLTZEN,

Standard Oil Building, San Francisco 4, California,

Of Counsel.

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No. 11,953

IN THE

**United States Court of Appeals
For the Ninth Circuit**

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING REFINING AND
MINING COMPANY, a corporation, FIRST
NATIONAL BANK OF FAIRBANKS, Exec-
utor of the Estate of Gustaf Soder-
blom, deceased, and WALTER JENSEN,

Appellees.

BRIEF FOR APPELLEES.

STATEMENT OF JURISDICTION.

This is an appeal from a decree of the District Court of the United States for the Territory of Alaska, Fourth Judicial Division, quieting appellees' title to two placer mining claims.

The district court had jurisdiction under R.S. 2325 and 2326 as amended, 30 U.S.C.A. 29, 30; Act of June 6, 1900, c. 786, 31 Stat. 322, 48 U.S.C.A. 101; Act of June 7, 1910, 36 Stat. 459, 48 U.S.C.A. 386; and Compiled Laws of Alaska, 1949, sec. 56-1-91, formerly Compiled Laws of

Alaska, 1933, sec. 4001. This court has jurisdiction under the Act of June 25, 1948, c. 646, 62 Stat., 28 U.S.C.A. 1291, 1294 (formerly Judicial Code sec. 128; 28 U.S.C.A. 225). The pleadings and proceedings necessary to show the existence of the jurisdiction are the complaints (Tr. pp. 2-5, 6-10), the answers (Tr. pp. 10-19, 20-27), the replies (Tr. pp. 28-29, 29-31) and the decree (Tr. pp. 63-67).

STATEMENT OF THE CASE.

Except as hereinafter specifically noted appellant's statement of the case is adequate. We limit ourselves to an outline of the case and corrections in the statement of facts.

The Snow Shoe Fraction was located in 1908 by W. E. Sullivan and the L Association was located in 1908 by John McCandlish for himself and others. Titles to both placer mining claims were subsequently acquired by appellees.

In 1941 appellant on behalf of herself and another staked out claims over-lapping those of appellees, and in 1945 appellant applied for patents for the over-lapping claims in the United States Land Office at Fairbanks. Appellees duly filed adverse claims in said Land Office and commenced two actions in the district court below to quiet title in support of their adverse claims, one concerning The Snow Shoe Fraction (Case No. 5493, Tr. pp. 2-5), and the other concerning the L Association (Case No. 5494, Tr. pp. 6-10).

The cases were consolidated for trial before the court with an advisory jury which, after being instructed (Tr. pp. 32-45), returned an advisory verdict in favor of appellees on all points, finding that valid locations were made of both claims and that all required annual labor had been done (Tr. pp. 46-47).

On April 1, 1948, the court below made and filed its Findings of Fact and Conclusions of Law (Tr. pp. 53-59, 60-62), and on April 6, 1948, entered its decree quieting appellees' title to The Snow Shoe Fraction and the L Association, denying to appellant any rights in said claims, and allowing appellees their costs of suit, including a reasonable attorney's fee fixed by the court at \$500 (Tr. pp. 63-67). Appellant perfected an appeal to this court. Appellees do not question the jurisdiction of this court or the sufficiency of the procedure in prosecuting the appeal.

The appellant has chosen to argue only three questions on appeal: the repeal of the Waskey Act (App. Br. pp. 12-48), the validity of The Snow Shoe Fraction location (App. Br. pp. 48-50), and the propriety of allowing attorney's fees (App. Br. pp. 50-52).

Appellant's first argument is based on the contention that appellees' claims were forfeited because of failure to perform annual labor or to file proofs of labor as required by the Waskey Act. It is conceded for purposes of this appeal that the performance of labor and filing of notices of intention to hold mining claims under the statutes suspending annual labor have the same effect.

We call the court's attention to appellant's misstatements on pages 10 and 11 of the brief:

“* * * there was a complete failure to do assessment work or to file proofs of labor evidencing it, during many of the years intervening between 1909 and 1939, and the propriety of the claimed improvements shown in some of the proofs of labor may be subject to question;”

* * * *

“* * * no attempt was made by appellees to show the performance of annual labor during such years, * * * there were so many years when no proofs of labor or suspension notices were filed at all, it seems unnecessary to devote time to a consideration of the legal sufficiency of some of the suspension notices or the eligibility of certain of the claimants therein to claim exemption * * *”

These statements are gratuitous, unsupported by any evidence in the transcript, and fly in the teeth of the verdict (Tr. pp. 46-47) and the Findings of Fact (Tr. pp. 58-59) to the effect that all required labor was done.

Appellant's confused analysis and inaccurate statement of facts as to the effect of a reversal of the judgment on the Waskey Act is best answered by merely stating that should the case be reversed then appellees must be given the opportunity to prove their performance of annual labor or the filing of notices of intention to hold mining claims, as the case may be.

Before commencing their discussion of the legal questions of this appeal, appellees wish to call attention to the illuminating opinion of District Judge Pratt in the court below (*United States Smelting Refining & Mining Co. v. Lowe* (D.C. Alaska 1947) 74 F.Supp. 917). Although not a part of the technical record on appeal (*Parker v. St. Sure*

(9 Cir. 1931) 53 F. 2d 706) it is included in the Transcript of Record in part (pp. 144-165). The opinion deals with appellees' first two points at length, and we refer this court to it for a helpful discussion of the issues.

SUMMARY OF ARGUMENT.

1. The Waskey Act was repealed by implication in 1938.

Background of General Mining Law

Resumption of Labor

Burden of Proof

Passage of Waskey Act, March 2, 1907

Passage of Act of May 31, 1938

Review of Authorities

Extent of repeal of Waskey Act

2. The repeal of the Waskey Act put the burden of proving forfeiture, before and after its repeal, on appellant.
3. The Snow Shoe Fraction, as described in the Decree Quieting Title, is a validly located placer mining claim.
4. Appellees are entitled to the attorney's fee set by the lower court.

ARGUMENT.

1. The Waskey Act Was Repealed By Implication in 1938.

In order to place the Waskey Act (Act of March 2, 1907, c. 2559, 34 Stat. 1243; 48 U.S.C.A. 384) and the Act

of May 31, 1938, c. 297; 52 Stat. 588; 48 U.S.C.A. 381, in proper focus a brief chronology is important.

In so far as annual labor is concerned, the general mining law of the United States is contained in Revised Statutes, section 2324, stemming from the Act of May 10, 1872, c. 152; 17 Stat. 91, 92; 30 U.S.C.A. 28. On June 6, 1900, R.S. 2324 read in part as follows:

“On each claim located * * * and until a patent has been issued therefor, not less than \$100 worth of labor shall be performed or improvements made during each year. * * * but where such claims are held in common, such expenditure may be made upon any one claim; and upon a failure to comply with these conditions, the claim or mine upon which such failure occurred shall be open to relocation in the same manner as if no location of the same had ever been made, provided that the original locators, their heirs, assigns, or legal representatives, have not resumed work upon the claim after failure and before such location.”

This section enunciates the doctrine of “Resumption of Labor.” This doctrine reflects the policy of our legal system which frowns upon forfeitures, in mining law as well as in the general field of equity. If a claimant actually begins work in good faith and diligently prosecutes it to completion before adverse rights vest, that is, before a stranger does all things necessary to make a valid relocation, there is no forfeiture.

A concomitant rule, of equal age and dignity, is that a person claiming a forfeiture has the burden of proving it.

“As to the alleged forfeiture set up by defendant, it is sufficient to say that the burden of proving it rested upon him; that the only pretense of a forfeiture was that sufficient work, as required by law, each year, was not done on the claim in 1882; and that the evidence adduced by him on that point was very meagre and unsatisfactory, and was completely overborne by the evidence of the plaintiff. *Belk v. Meagher*, 104 U.S. 279. A forfeiture cannot be established except upon clear and convincing proof of the failure of the former owner to have work performed or improvements made to the amount required by law” (*Hammer v. Garfield Mining Co.* (1889) 130 U.S. 291, 301, per Field, J.).

The following authorities are to the same effect:

Quigley v. Gillett (1894) 101 Cal. 462, 35 Pac. 1040;
Harris v. Kellogg (1897) 117 Cal. 484, 49 Pac. 708;
Beals v. Cone (1900) 27 Colo. 473, 62 Pac. 948, 958
 (App. Dism. 188 U.S. 184);

Morrison's Mining Rights (16th Ed. 1936) p. 130;
 Lindley on Mines (3rd Ed. 1914) Vol. 2, sec. 645,
 pp. 1605, 1606.

Indeed, the doctrine of resumption of labor would have little practical value without this procedural rule of burden of proof, for over the years proof of labor becomes more and more difficult what with change of ownership and deaths of witnesses. Were it not for the procedural rule claim jumpers could disregard the doctrine of resumption of labor with relative impunity, knowing full well that in many cases the rightful owner could not sustain the burden of proof, especially where he acquired his ground

years after the original location, as did the appellees in the instant case.

The procedural rule applies from the moment a valid location is shown. A claimant who proves a valid mining location has made a *prima facie* case that as of the date of his pleading he has maintained his claim in good standing by performing the annual labor.

Hammer v. Garfield Mining Co. (1889) 130 U.S. 291, 300;

Anderson v. Anvil Hydraulic Co. (1908) 3 Alaska 496;

Renshaw v. Switzer (1887) 6 Mont. 464, 13 Pac. 127.

(The jury found that the locations of both The Snow Shoe Fraction and the L Association were valid and that the required annual labor had been performed (Tr. p. 46). The court confirmed this finding (Tr. pp. 55, 56, 58). Appellant failed to prove any forfeiture.)

Such was the general mining law of the United States outside of Alaska when on May 17, 1884, Congress, in setting up a civil government for Alaska, provided in part that “* * * the laws of the United States relating to mining claims, and the rights incident thereto, shall, from and after the passage of this act, be in full force and effect in said district, * * *” (23 Stat. 24, 26, c. 53, sec. 8).

In the Act of June 6, 1900, Congress reaffirmed its intent as expressed in the Act of May 17, 1884, by stating in the later Act:

“The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the District of Alaska; * * *” (31 Stat. 321, 329, c. 786, sec. 26; 48 U.S.C.A. 381).

The "laws of the United States relating to mining claims, mineral locations, and rights incident thereto" being undisputed, it is clear that on June 6, 1900, the following rules applied in Alaska:

(a) A locator or his successor in interest could prevent a forfeiture by resuming labor on his mining claim and completing it before a second or junior locator completed all acts necessary to constitute a valid relocation. Appellant concedes (Br. p. 10) that under the Act of June 6, 1900, and if the Waskey Act has been repealed, appellees had not forfeited their claims at the time appellant's were located.

(b) Once a valid location is proved the burden is on the junior locator to prove by clear and convincing evidence that a forfeiture resulted from failure to do the necessary work.

Seven years after the Act of June 6, 1900, Congress passed the so-called Waskey Act which, in view of its importance here, we set forth in full:

"An Act To amend the laws governing labor or improvements upon mining claims in Alaska.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That during each year and until patent has been issued therefor, at least one hundred dollars' worth of labor shall be performed or improvements made on, or for the benefit or development of, in accordance with existing law, each mining claim in the district of Alaska heretofore or hereafter lo-

cated. And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claim shall be situate an affidavit showing the performance of labor or making of improvements to the amount of one hundred dollars as aforesaid and specifying the character and extent of such work. Such affidavit shall set forth the following: First, the name or number of the mining claims and where situated; second, the number of days work done and the character and value of the improvements placed thereon; third, the date of the performance of such labor and of making improvements; fourth, at whose instance the work was done or the improvements made; fifth, the actual amount paid for work and improvement, and by whom paid when the same was not done by the owner. Such affidavit shall be *prima facie* evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements. And upon failure of the locator or owner of any such claim to comply with the provisions of this Act, as to performance of work and improvements, such claim shall become forfeited and open to location by others as if no location of the same had ever been made. The affidavits required hereby may be made before any officer authorized to administer oaths, and the provisions of sections fifty-three hundred and ninety-two and fifty-three hundred and ninety-three of the Revised Statutes are hereby extended to such affidavits. Said affidavits shall be filed not later than ninety days after the close of the year in which such work is performed.

Sec. 2. That the recorders for the several divisions or districts of Alaska shall collect the sum of one dollar and fifty cents as a fee for the filing, recording, and indexing said annual proofs of work and improvements for each claim so recorded. Approved March 2, 1907'' (34 Stat. 1243, c. 2559).

As the title indicates, the purpose of the Waskey Act was to amend the laws governing labor or improvements upon mining claims in Alaska, and the result was that Alaska laws were no longer in accord with the general mining laws of the United States. The Waskey Act was grafted on the general mining law previously made applicable to Alaska and changed the mining laws of Alaska in three particulars:

First: It permitted the owner of a claim to file an affidavit of performance of labor, such affidavit being *prima facie* evidence of such labor. This effect of the Waskey Act is not in issue here.

Second: If such an affidavit was not filed the owner had the affirmative burden of proving labor.

Third: If the owner failed to do the work, his claim was automatically forfeited.

The Waskey Act was immediately enforced by the courts, which held that it repealed the resumption of labor provisions of the Act of June 6, 1900.

Thatcher v. Brown (9 Cir. 1911) 190 Fed. 708, 711;

Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (9 Cir. 1914) 210 Fed. 599.

It necessarily followed that "the laws of the United States relating to" the burden of proof as enunciated in

Hammer v. Garfield, supra, and the other cases cited on pages 7 and 8, above, were repealed.

The Alaska mining law by virtue of the Waskey Act remained an anomaly in the field of annual assessment work until 1938 and deprived Alaskans of the generous resumption of labor privileges extended elsewhere by the federal mining laws. In that year the Act of May 31, 1938, amended the Act of June 6, 1900, in the following manner (provisions not important to this discussion being omitted):

“To amend section 26, title I, chapter 1, of the Act entitled ‘An Act making further provision for a civil government for Alaska, and for other purposes’, approved June 6, 1900.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section 26, title I, chapter 1, of the Act entitled ‘An Act making further provision for a civil government for Alaska, and for other purposes’, approved June 6, 1900 (31 Stat. 321), is amended to read as follows:

‘Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights incident thereto are hereby extended to the Territory of Alaska: * * *’ (52 Stat. 588, c. 297).

Obviously this is substantially the same as the corresponding part of the Act of June 6, 1900.

Appellees contend, and the court below so held, that the Act of May 31, 1938, necessarily repealed the conflicting

sections of the Waskey Act. Such repeal was by implication, there being no express repealing clause. This had the effect of again extending to Alaska the rules on resumption of labor and burden of proof formerly a part of Alaskan law under the Act of June 6, 1900. Appellant has conceded (App. Br. p. 10) that appellees had resumed work prior to her locations, assuming there had been any failure to do assessment work.

We think that the rules governing implied repeal are well set forth in the following quotations from appellant's own authorities:

“Where two legislative acts are repugnant to, or in conflict with, each other, the one last passed, being the latest expression of the legislative will, will although it contains no repealing clause, govern, control, or prevail, so as to supersede and impliedly repeal the earlier act to the extent of the repugnancy, provided the conflict, inconsistency, or repugnancy is of the character and degree requisite to the application of the rule. Obviously, there is no implied repeal on the ground of inconsistency or repugnancy where there is no conflict, antagonism, inconsistency, or repugnancy between the acts in question, as where the later act is merely affirmative, cumulative, or auxiliary. Indeed, it has been declared generally in some cases that inconsistency or repugnancy is necessary to effect a repeal by implication; but this statement is incorrect in that it leaves out of consideration the general rule that, even though the two acts are not repugnant, a later act impliedly repeals an earlier act where it covers the whole subject thereof and plainly shows that it is intended as a substitute therefor” (59 C.J. 910).

Mr. Sutherland's work on Statutory Construction (3d Ed. Horack 1943) Vol. 1, pp. 463-465, states the rule as follows:

"When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails, and the prior law yields to the extent of the conflict."

There are accordingly two indications of repeal by implication: (a) where there is inconsistency or repugnancy, and (b) where the later enactment covers the entire field. In the case at bar *both* indications are present.

The two Acts are inconsistent and repugnant in the following respects:

The Waskey Act	The 1938 Act (General Mining Law)
(a) Affidavit of performance was <i>prima facie</i> evidence thereof.	(a) No affidavit and no <i>prima facie</i> evidence.
(b) Burden of proof on owner to establish performance if affidavit not filed.	(b) Burden of proof on person alleging forfeiture.
(c) Claim forfeited forthwith upon expiration of labor year without performance of assessment work.	(c) Claim not forfeited; locator permitted to resume work prior to relocation by another.

The inconsistencies and repugnancies are apparent. Since the Waskey Act repealed the Act of June 6, 1900 (*Thatcher v. Brown, supra; Ebner Gold Mining Co. v.*

Alaska-Juneau Gold Mining Co., supra), the Act of May 31, 1938, must have repealed the Waskey Act (*Koprivica v. Sather* (1945) 10 Alaska 593). Any "presumption" against such repeal is defeated and the legislative intent to repeal is shown by these inconsistencies and repugnancies.

Crawford, *The Construction of Statutes* (1940) sec. 310, pp. 630-631 (App. Br. p. 12).

Where, as here, two acts cannot stand together and operate on the same matter, in the same place and at the same time, the latter repeals the earlier or, in the words of Mr. Justice Field, if the two acts "are repugnant in any of their provisions, the latter act, without any repealing clause, operates to the extent of the repugnancy as a repeal of the first * * *" (*United States v. Tynen* (1870) 11 Wall. 88, 92).

If the laws of the United States apply in Alaska, then a locator may prevent a forfeiture by resuming work and a person claiming forfeiture must prove the forfeiture. If these two rules do not apply in Alaska, then the mining laws of the United States do not extend to Alaska. There is no middle ground. Either the Waskey Act has been repealed or the Act of May 31, 1938, does not mean what it says. Unless it can be shown how a mining claim can be forfeited at 12:00 M. on July 1st in any labor year because of failure to do the representation work, and at the same time the owner can save the claim by resuming work thereafter and prior to another's location of the same ground, appellant's position is untenable. We submit that it is.

Turning now to cases supporting appellees' position, we find ample support for the rule that unless there is evidence of contrary legislative intent the later inconsistent act repeals the earlier one. This is the rule of the federal courts and of the state courts, including the courts of Oregon on which appellant leans so heavily. The following cases are illustrative.

In 1918 the Louisiana legislature passed a general statute concerned with chattel mortgages. In 1934 it passed a statute dealing with oil laborers' liens which impliedly amended the act of 1918. In 1936 the Act of 1918 was substantially reenacted, and the Federal District Court in Louisiana held that the Act of 1936 nullified the implied amendment of 1934.

In re Lent (W.D. La. 1940) 34 F.Supp. 700.

An Act of Congress dated March 3, 1891, provided for appeals to the circuit court in certain injunction cases. The Act of February 18, 1895, amended the prior act and increased the class of appealable cases. The Act of June 6, 1900 (not the Act here involved), purported to amend the Act of March 3, 1891, and omitted some of the classes of cases added by the intermediate act without mentioning that act. It was held that the Act of June 6, 1900, necessarily repealed the intermediate act of February 18, 1895.

Heinze v. Butte & B. Consol. Min. Co. (9 Cir. 1901)
107 Fed. 165;

Columbia Wire Co. v. Boyce (7 Cir. 1900) 104 Fed.
172.

Such cases show the federal rule to be that without evidence of contrary intent, the later legislative enactment

repeals the earlier, and so the Act of May 31, 1938, repealed the Waskey Act.

In *State v. Schaumburg* (1921) 149 La. 470, 89 So. 536, the state court held that a general law concerning the filling of vacancies on school boards throughout the state impliedly repealed a special law concerning vacancies in one parish where the general law was approved one day after the special law.

The same result has been reached by other federal and state courts in similar situations involving inconsistent statutes:

Henrietta Mining & Milling Co. v. Gardner (1899)
173 U.S. 123;

Safe Harbor Water Power Corp. v. Federal Power Com'n. (3 Cir. 1941) 124 F.2d 800;

H. Rouw Co. v. Crivella (8 Cir. 1939) 105 F.2d 434
(reversed on other grounds, 310 U.S. 612);

Anchor Line v. Aldridge (S.D. N.Y. 1921) 280 Fed.
870;

In re van Der Schuur (N.D. Cal. 1937) 20 F.Supp.
42;

Drach v. People (1916) 61 Colo. 584, 158 Pac. 812;

State v. Lightner (1915) 77 Ore. 587, 152 Pac. 232;

Whitfield v. Davies (1914) 78 Wash. 256, 138 Pac.
883;

Reynolds v. Board of Education (1903) 66 Kan.
672, 72 Pac. 274;

Morris v. Neider (1940) 259 App.Div. 49, 18 N.Y.S.
2d 207;

People v. Board of Com'rs of Cook County (1931)
345 Ill. 172, 177 N.E. 705;

In re Metcalf's Estate (1935) 319 Pa. 28, 179 Atl. 587;

Leach v. Exchange State Bank (1925) 200 Iowa 185, 203 N.W. 31.

Perhaps the best refutation of appellant's position was made by the Supreme Court of Pennsylvania in *In re Metcalf's Estate*, supra. That case involved conflicting claims of the Commonwealth of Pennsylvania and the City of Philadelphia against a decedent's estate. The appellant Commonwealth claimed priority by virtue of an act of 1915 superseding an act of 1834. The City claimed the act of 1915 was superseded by the re-enactment in 1917 of the portions of the act of 1834 giving the City priority. In upholding the claim of the City, the court said (179 Atl. at p. 588):

“Appellant's argument, based on the rule of law that, ‘In so far as a later law is merely a re-enactment of an earlier one, it will not repeal an intermediate act which qualifies or limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first’ (59 C.J. 926 sec. 528f), *ignores the exception to the rule that, ‘where the re-enacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed’*” (italics ours).

We have already referred to the case of *Thatcher v. Brown* (9 Cir. 1911) 190 Fed. 708, the first case to hold that the Waskey Act impliedly repealed the Act of June 6, 1900. This case arose in the second division of the Dis-

trict Court of Alaska and was ultimately decided by the Court of Appeals for the Ninth Circuit. In his opinion, Judge Ross pointed out that the Waskey Act changed the rule of the Act of June 6, 1900, by declaring that a claim was immediately forfeited upon the failure to do the required annual labor. Judge Ross concluded that the Waskey Act necessarily impliedly repealed the Act of June 6, 1900, and he said (p. 711):

“It is true that the act of March 2, 1907, contains no express repeal of any previous provision of the statutes, and it is also true that implied repeals are not favored. Still the courts are not at liberty to ignore a purpose to repeal clearly indicated by irreconcilable provisions. Here we have an old mining statute, made applicable to Alaska by the act of June 6, 1900, expressly providing that while a failure on the part of the locator to complete the required annual assessment work would render the ground covered by the location open to relocation, yet such work might be resumed by the locator or his legal representatives, provided no other location had intervened, and then a later act to amend the law upon the subject in so far as mining claims in Alaska are concerned, which in terms declares that upon the failure of the locator to perform the required amount of work upon the claim within the year ‘such claim shall become forfeited and open to location by others as if no location of the same had ever been made.’

Both acts expressly require \$100 worth of work or improvements to be done or made on or for the benefit of each claim during each year. But the consequences of a failure to complete such work or improvements within the year are differently declared, and such differences are irreconcilable. In the earlier

act such failure is not declared to end the locator's right; but he is thereby given the right to resume the work after the expiration of the year, provided there has been no other location meanwhile. By the later act no such permission is accorded, and there is therein an express declaration that such failure works a forfeiture of the claim. To that extent the prior law, so far as it affects claims in Alaska, was necessarily repealed by the later one."

The court today is faced with the exact reverse of the situation faced by Judge Ross and his colleagues, Judges Morrow and Wolverton, and the judgment of the court below could be affirmed on the basis of their decision alone. Certainly if the inconsistencies which existed between the 1900 act and the Waskey Act were so repugnant and so irreconcilable as to require a repeal by implication of the earlier act, the same inconsistencies and repugnancies compel a repeal of the Waskey Act by the Act of May 31, 1938. It has been so held by the District Court for the Territory of Alaska, Fourth Judicial Division, in *Koprivica v. Sather* (1945) 10 Alaska 593, and by the same court in this case.

Examination of the cases cited by appellant reveals that she has failed to appreciate the importance of the legislative chronology. In this case exact analysis of the facts reveals this pattern:

Statute 1—the Act of June 6, 1900;

Statute 2—the Waskey Act, repealing Statute 1;

Statute 3—the Act of May 31, 1938, re-enacting pertinent portions of Statute 1.

Shortly stated, the question in this case is whether an intermediate act repealing an earlier act is itself repealed by the re-enactment of the earlier act.

Five of appellant's cases can be immediately distinguished and discarded on the basis of this analysis for the reason that in each of them the intermediate act did not repeal the earlier act and thus could not be inconsistent with the re-enactment.

Posadas v. National City Bank (1935) 296 U.S. 497
(App. Br. pp. 12, 13, 25);

George v. City of Asheville, N. C. (4 Cir. 1935) 80
F.2d 50 (App. Br. p. 13);

Eddy v. Kincaid (1895) 28 Or. 537, 41 Pac. 156
(rehearing denied, 41 Pac. 655) (App. Br. pp.
13, 14, 17);

Bayless v. Douglas County (1910) 57 Or. 301, 111
Pac. 384 (App. Br. pp. 13, 14, 17);

Rosa v. City of Bandon (1914) 71 Or. 510, 142 Pac.
339 (App. Br. pp. 14, 18).

Appellant has quoted from *Eddy v. Kincaid*, *supra* (App. Br. p. 17) but has neglected to mention that on petition for rehearing (41 Pac. 655) the court specifically held that there was no conflict between the intermediate and the other acts.

Six of appellant's cases can similarly be distinguished and discarded for the reason that in each either there was no intermediate act or the intermediate act was not in issue.

Great Northern Ry. Co. v. United States (8 Cir.
1907) 155 Fed. 945 (App. Br. pp. 13, 26);

- Brun v. Lazzell* (1937) 172 Md. 314, 191 Atl. 240
(App. Br. p. 23);
- Duggan v. Ogden* (1932) 278 Mass. 432, 180 N.E.
301 (App. Br. p. 23);
- State v. Cochran* (1909) 55 Or. 157, 104 Pac. 419
(App. Br. pp. 14, 18);
- State v. McGinnis* (1910) 56 Or. 163, 108 Pac. 132
(App. Br. pp. 14, 17, 23);
- In re Wilson's Estate* (1936) 102 Mont. 178, 56
P.2d 733 (App. Br. pp. 13, 23).

Although appellant has attempted to make much of the thesis that the re-enacted portions of a statute are not repealed for the instant between the repeal of the earlier statute and its re-enactment, *this is not in point* for the reason that it is clear that Statute 1 in this case (the Act of June 6, 1900) *was* repealed by Statute 2 (the Waskey Act).

- Thatcher v. Brown* (9 Cir. 1911) 190 Fed. 708, 711;
Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co. (9 Cir. 1914) 210 Fed. 599.

The rule relied upon by appellant has validity when properly applied, as in *Great Northern Ry. Co. v. United States*, *supra*. In that case the question was whether an act violating Statute 1 (the Elkins Act of 1903) was punishable under Statute 3 (the Hepburn Act of 1906; there was no Statute 2) when the act occurred in 1905 but prosecution was not commenced until after 1906. The defendant claimed that the act of 1906 repealed the act of 1903 and thus wiped out all violations not already in the course of prosecution. Had the defendant prevailed

there would have been an hiatus of some three years during which no violations of the Elkins Act could have been punished unless prosecution was commenced before 1906. Such a result would have been ludicrous and was properly avoided in the *Great Northern* case and in the other cases cited above.

That is not this case. Statute 1 (the Act of June 6, 1900) had been repealed in Alaska for thirty-one years prior to the enactment of Statute 3 (the Act of May 31, 1938).

In three of appellant's cases it was specifically held that Statute 3 did repeal Statute 2 or at least rendered it without effect.

State v. Cochran (1909) 55 Or. 157, 104 Pac. 419
(App. Br. pp. 14, 18);

State v. Schluer (1911) 59 Or. 18, 115 Pac. 1057
(App. Br. pp. 14, 18);

State v. Lightner (1915) 77 Or. 587, 152 Pac. 232
(App. Br. pp. 14, 20, 22).

In *State v. Schluer*, *supra*, the charter of the City of Joseph gave the City Council power to license liquor sales. Thereafter, in 1904, a state local option law was passed. Among the provisions was one forbidding a single precinct to repeal prohibition until the whole county voted to repeal. In 1910 the Constitution of the State of Oregon was amended to give each city power to license liquor sales but stating that "such municipality shall within its limits be subject to * * * the local option law * * *." The court held that the constitutional amendment of 1910 impliedly repealed the local option law of 1904, in that at

any time a city could repeal prohibition without awaiting action by the entire county. The actual decision of the case was against the City of Joseph for the reason that land outside the city limits was included in its precinct and therefore the repeal did not affect that precinct.

This case is not squarely in point since the amendment of 1910 was not a re-enactment of the early charter of Joseph, but it does show that in Oregon, as elsewhere, implied repeal results from an inconsistent enactment. Certainly the case offers appellant no aid and comfort.

The other two cases cited above are similar in their effect. Appellant has attempted (App. Br. pp. 20-22) to twist *State v. Lightner*, supra, into a favorable decision. We submit that on the basis of our analysis and Judge Pratt's reasoning (*United States Smelting Refining & Mining Co. v. Lowe*, supra, at p. 922; Transcript of Record, p. 150) appellant has failed.

Appellant has also cited at least seven cases which, although they contain Statute 1, Statute 2 and re-enacting Statute 3, cannot be considered as holding contrary to appellees' present position because in each case the court had a very practical reason for finding that the legislature had not intended to repeal the intermediate act: the legislature had not known that the intermediate act had repealed the earlier act.

Stingle v. Nevel (1880) 9 Or. 62 (App. Br. pp. 14, 18);

Eddy v. Kincaid (1895) 28 Or. 537, 41 Pac. 156 (App. Br. pp. 13, 14, 17);

Small v. Lutz (1902) 41 Or. 570, 67 Pac. 421 (App. Br. pp. 13, 17);

Renshaw v. Lane County Court (1907) 49 Or. 526, 89 Pac. 147 (App. Br. pp. 14, 17);

State v. County Court (1909) 54 Or. 255, 101 Pac. 907 (App. Br. pp. 12, 14, 18);

City of Woodburn v. Aplin (1913) 64 Or. 610, 131 Pac. 516 (App. Br. pp. 14, 19);

Noonan v. City of Portland (1938) 161 Or. 213, 88 P.2d 808 (App. Br. pp. 13, 22).

Prior to 1876 Oregon law authorized the directors of school districts to issue warrants to clerks to collect taxes in the same manner as state and county taxes were collected. In 1876 the legislature gave the sheriff power to collect such taxes by levy and sale. In 1878 the legislature revised the old school law and in so doing re-enacted the old provision as to the collection of taxes. The court in *Stingle v. Nevel*, supra, held that the act of 1878 did not repeal the act of 1876. The reasoning of the court is illuminating. The act of 1876 repealed the old law only by implication and there had been no decision so holding prior to *Stingle v. Nevel*. Therefore, the court decided, the legislature could not have known that the old act was repealed, and without such knowledge there could be no intent to repeal the intermediate act.

The other cases cited above all contain the same factual situation. If we compare this with the case at bar the distinction is clear: Congress was well aware of the fact that the Waskey Act had repealed the Act of June 6, 1900, because it had been so held by this court long before May

31, 1938 (*Thatcher v. Brown*, supra, in 1911; *Ebner Gold Mining Co. v. Alaska-Juneau Gold Mining Co.*, supra, in 1914).

Only one of appellant's cases remains to be distinguished:

Allison v. Hatton (1905) 46 Or. 370, 80 Pac. 101 (App. Br. p. 16).

The facts of that case offer clear evidence that no implied repeal of the intermediate act was intended by the legislature. An Oregon statute of 1885 created the County of Columbia and fixed its boundaries. In 1898 the legislature fixed more definite boundaries for the adjoining County of Washington and in so doing took a strip of land from Columbia as described in the act of 1885 and added it to Washington. Specific provision was made for re-recording in Washington title documents to said strip already recorded in Columbia. Unfortunately there remained a no-man's land between Columbia and Washington counties not included in the description of either. To remedy this defect the legislature in 1901 amended the act of 1885 to include this forgotten area. In so doing it re-enacted the remainder of the description of Columbia county without regard to the effect of the intermediate act of 1898. No provision was made for re-recording title documents to the strip transferred to Washington by the Act of 1898 such as was made in that act.

On these facts the court necessarily held that the Act of 1901 was not intended to repeal the Act of 1898. To have held otherwise would have thrown titles into a state of wild confusion all to no purpose.

Such a case is far removed from this one. Here there is no such evidence of lack of intent to repeal; on the contrary, and consistent with all authorities on the subject, the intent to repeal is affirmatively shown by the inconsistencies and repugnancies of the Waskey Act and the Act of May 31, 1938, and the fact that the 1938 Act covered the entire field. No confusion, no anomaly will result from such repeal. The anomaly will be cast aside and the law of Alaska will become consistent once more with "the laws of the United States relating to mining claims, mineral locations and rights incident thereto."

Since appellant has relied on Oregon law almost exclusively, it is interesting to note that the Oregon Constitution requires that a law may be amended only by insertion at length in the new act.

Constitution of Oregon, sec. 22; 1 Oregon Code Annotated 113.

Such a provision undoubtedly influences Oregon courts in determining whether there has been an implied repeal of a separate intermediate act. As Judge Pratt has pointed out, however (*United States Smelting Refining & Mining Co. v. Lowe*, supra, at p. 921; Transcript of Record, pp. 148, 149), no such rule applies to acts of Congress.

A similar rule, that repealed statutes must be mentioned in the title of the repealing act, has also influenced Oregon courts.

State v. County Court (1909) 54 Or. 255, 101 Pac. 907 (App. Br. pp. 12, 14, 18).

Once again, cases based on this rule can have no bearing on cases arising under acts of Congress.

Stated in a less confused fashion, appellant's third proposition which is called "Extent of Implied Repeal" (App. Br. pp. 34-48) is simply that the Act of May 31, 1938, admitting it abolished automatic forfeiture, nevertheless retained the burden of proof provisions of the Waskey Act.

This is merely a part of the general question of the repeal of the Waskey Act, which we have already considered, as a part of appellees' general argument on the repeal of the Waskey Act (*supra*, pp. 5-20). The inconsistencies exist in fact and are pointed out at page 14 above. No attempt to disguise these inconsistencies can help appellant's case.

It makes no difference whether other states have laws similar to the Waskey Act on the burden of proof point. We are discussing "the laws of the United States" as applied to the Territory of Alaska. Appellant cannot even sustain her own contention that the state laws generally support her argument since the only case cited by appellant refutes the argument.

In commenting on a New Mexico statute which, like the Waskey Act, shifted the burden of proof, the Supreme Court of New Mexico said:

"This statute is unusual; New Mexico and Idaho being, as pointed out by Mr. Lindley (Lindley on Mines [2d Ed.] § 636), apparently the only jurisdictions having such a law" (*Upton v. Santa Rita Mining Co.* (1907) 14 N.M. 96, 89 Pac. 275, at p. 287) (App. Br. p. 46).

Without devoting further time to appellant's third proposition, we submit that the repeal of the Waskey Act by the Act of May 31, 1938, was a repeal of the burden of proof provision as well as of the forfeiture provision, under the rule of *Thatcher v. Brown*, supra.

2. The Repeal of the Waskey Act Put the Burden of Proving Forfeiture, Before and After its Repeal, on Appellant.

The repeal of the Waskey Act had a twofold effect on the burden of proof as applied to this case.

First. Appellant must support the burden of proof of any forfeiture claimed to have occurred before July 1, 1938.

Second. Appellant must prove that since July 1, 1938, appellees have failed either to perform the required annual labor on the claims in question or to record notices of intention to hold under the moratorium statutes, and that appellant relocated *before* appellees resumed work.

That appellant must support the burden of proof of any forfeiture prior to July 1, 1938, is the general rule, and the Act of May 31, 1938, reinaugurating it in Alaska, applies retrospectively.

Burden of proof is a procedural matter and may be changed by statute at any time. In matters of evidence and burden of proof, the latest statute governs even though passed after the substantive cause of action accrued.

“Remedial statutes, such as this, which affect only the procedure and practice of the courts in the enforcement of a right, and which do not impair the right itself, or wholly destroy a pre-existing remedy,

are retroactive in the sense that they must be applied to causes of action existing at the time of their passage in all cases where the suit is subsequently commenced'' (*Southern Indiana Ry. Co. v. Peyton* (1901) 157 Ind. 690, 61 N.E. 722, 723).

This rule has been applied in cases involving the shifting of the burden of proving or disproving contributory negligence.

Smith v. Freedman (1929) 268 Mass. 38, 167 N.E. 335;

Sackheim v. Pigueron (1915) 215 N.Y. 62, 109 N.E. 109;

Southern Indiana Ry. Co. v. Peyton, *supra*.

The New York Court of Appeals, holding that a statute permitted suit upon a money judgment, even though no such suit was possible at the time the judgment was entered, stated:

"It is the settled law that statutes relating to procedure are retroactive and prospective in their application without affirmative provisions to that effect'' (*Peace v. Wilson* (1906) 186 N.Y. 403, 79 N.E. 329, 330).

The same rule has been applied by many courts.

Bear Lake Irrigation Co. v. Garland (1896) 164 U.S. 1;

South Carolina v. Gaillard (1879) 101 U.S. 433;

Virginia & West Virginia Coal Co. v. Charles (W.D. Va. 1917) 251 Fed. 83, 127-128;

Carson v. Miami Coal Co. (1923) 194 Ind. 49, 141 N.E. 810;

Woodvine v. Dean (1907) 194 Mass. 40, 79 N.E. 882;

Stocker v. Foster (1901) 178 Mass. 591, 60 N.E. 407;

First Methodist Episcopal Church v. Fadden (1898) 8 N.D. 162, 77 N.W. 615;

Ensley v. State (1910) 4 Okl.Cr. 49, 109 Pac. 250;

Baxter v. Hamilton (1897) 20 Mont. 327, 51 Pac. 265.

The appellant has failed to prove any forfeiture and has, therefore, failed to support the burden of proof placed upon her.

In the second proposition (App. Br. pp. 29-34) appellant argues that appeal cannot affect rights vested or revive rights lost under the repealed statute. Assuming that to be true, we fail to see what bearing it has on this case. The only vested rights were those of appellees under the locations made in 1908. Appellant assumes as a fact in her brief (App. Br. p. 29) that appellees' locations were forfeited. This is the very question at issue and a question which was answered in appellees' favor in the lower court.

The ultimate answer to the question "Did appellees have any rights," turns upon the immediate answer to the question "Who has the burden of proof." We submit that on the basis of the authorities just cited the burden of proof is on appellant.

Only one case is cited in support of appellant's second proposition.

Perkins Mfg. Co. v. Clinton Const. Co. (1930) 211 Cal. 228, 295 Pac. 1 (App. Br. p. 33).

This case involved the effect of a statute repealing an earlier statute which made a contract void. The case held that the later act could not revive a void contract. There was no question in the case involving the effect on procedure of a repealing statute. In the case at bar the only question is procedural, and the case cited by appellant serves no useful purpose.

No one but appellant has suggested that substantive rights might be revived by repeal. Appellees' position is simply this: Burden of proof is a procedural matter, and the applicable rule is that in effect at the time of trial, regardless of when the substantive cause of action accrued. Appellant has failed to discuss this question, and has failed to prove the forfeiture she assumes throughout her brief.

In an attempt to evade the rule that burden of proof is a procedural matter appellant has consistently misstated and misinterpreted the Waskey Act.

The following is taken from page 32 of appellant's brief:

"From 1908 to 1937 appellees and their predecessors were required to file proofs of labor and if they failed to do so *the presumption was that they did not do the work.*

* * * * *

Whether required to file a proof of labor for years subsequent to 1938 or not, appellees were undoubtedly required so to file in prior years and their failure to do so, *has created a continuing presumption that the work was not done during these years*" (underscoring supplied).

The Waskey Act says no such thing. It says:

“And the locator or owner of such claim or some other person having knowledge of the facts may also make and file with the said recorder of the district in which the claims shall be situate an affidavit showing the performance of labor * * * Such affidavit shall be prima facie evidence of the performance of such work or making of such improvements, but if such affidavits be not filed within the time fixed by this Act the burden of proof shall be upon the claimant to establish the performance of such annual work and improvements” (34 Stat. 1243) (underscoring supplied).

Appellant attempts to make the filing of an affidavit mandatory and to read into the Act a presumption that does not exist. The filing of an affidavit is not mandatory, it is permissive; a failure to file created no presumption, it simply fixed the burden of proof.

So long as the Waskey Act was in effect the owner could (a) file an affidavit that the work had been done or (b) do the labor and not file an affidavit. In the latter case the owner had the burden of proving his labor *but there was no presumption* that the work was *not* done. As pointed out above, the undoubted rule is that the burden of proof may be shifted retroactively. The burden of proof was on appellees until 1938; thereafter it was on appellant.

Secondly, appellant must prove that since July 1, 1938, appellees have failed either to perform the required annual labor on the claims in question or to record notices of intention to hold under pertinent moratorium statutes,

and that appellant relocated *before* appellees resumed work on such claims.

Appellant has admitted (App. Br. p. 10) inability to make the required proof and, therefore, cannot claim by virtue of any alleged forfeiture occurring after July 1, 1938.

3. The Snow Shoe Fraction, as Described in the Decree Quieting Title, is a Valid Location.

Appellant questions the validity of The Snow Shoe Fraction, as described in the decree quieting title, her theory being that it was originally staked as a larger claim and so as to overlap other claims. This is true. But the case cited by appellant to the effect that such a location is entirely void concerned only an attempt to include in one location several small noncontiguous fractions (*Stenfjeld v. Espe* (9 Cir. 1909) 171 Fed. 825 (App. Br. pp. 48, 49)). The true rule is stated by Judge Lindley in another section not cited by appellant:

“In so far as the ground taken is vacant, each location, if properly made in other respects, will be valid” (Lindley on Mines (3d Ed. 1914) Vol. 2, sec. 373, p. 880).

All authorities discussing the subject have held that such a location, if otherwise valid, is void only as to the overlap.

Crown Point Min. Co. v. Buck (8 Cir. 1899) 97 Fed. 462.

The reason for this rule is well stated in *Doe v. Tyler* (1887) 73 Cal. 21, 14 Pac. 375, where the court said (pp. 22, 376):

“It is familiar history in mining districts that claims have often been found to overlap one another to a greater or less extent. In such cases the question as to the ground covered by two locations has been, which location was prior in time and superior in right; and it has never been held, so far as we know, that either of them must wholly fail because of the conflict. On the contrary, in so far as the ground taken was vacant, each location, if properly made in other respects, has been considered to be valid and sufficient.”

Doe v. Tyler, supra, is quoted with approval in *Upton v. Santa Rita Mining Co.* (1907) 14 N.M. 96, 89 Pac. 275, 286-287, from which case appellant has quoted at length (App. Br. pp. 46-47).

As appellant points out (App. Br. p. 49), The Snow Shoe Fraction, after portions were taken up in adjoining claims, was left as “a small triangle containing approximately two and one-half acres.” The remainder, and the area described in the decree quieting title, is a single claim composed of one parcel. It is not a group of non-contiguous parcels described as one claim.

4. Appellees Are Entitled to the Attorney's Fee Set by the Lower Court.

Relying entirely on Oregon law, appellant has objected strenuously (App. Br. pp. 50-52) to the allowance to appellees by the district court of an attorney's fee of \$500 (Tr. pp. 59, 62, 66-67).

Rather than take up further time in a discussion of a well-settled rule of law, we refer to Judge Wilbur's

opinion in the Alaskan case of *Forno v. Coyle* (9 Cir. 1935) 75 F.2d 692, at page 696:

“The appellant relies upon a number of cases decided by the Supreme Court of Oregon since 1921. These cases are not in point, since, as the appellant himself observes, they construe section 561 of the Oregon Laws (Olson, 1920), which was almost identical with section 1341 of the Laws of Alaska, *supra*. Neither section 561 of the Oregon Laws nor section 1341 of the Alaska Laws, however, contains the provision as to ‘reasonable’ attorneys’ fees ‘to be fixed by the court,’ which is found in the act of 1923, *supra*.

As to the objection that ‘no evidence was submitted to the jury’ on the question of what was a ‘reasonable’ attorney’s fee, we need only point out that no such evidence was necessary. In *Globe Indemnity Co. v. Sulpho-Saline Bath Co.* (C.C.A. 8) 299 F. 219, 222, certiorari denied, 266 U.S. 606, 45 S. Ct. 92, 69 L. Ed. 464, the court said: ‘The further point, in connection with the allowance of this [attorney’s] fee, that there was no evidence as to a reasonable amount is not open to examination. If it were, we would be inclined to hold that the court is as good [a] judge of reasonableness of attorney fees for services in that court as any one. Any testimony as to what would be a reasonable fee would be in the nature of expert evidence, and, as such, advisory but not binding upon the court.’”

See also *Pilgrim v. Grant* (1938) 9 Alaska 417.

The only difference between the Act of April 16, 1923 (Session Laws of Alaska, 1923, C. 38, pp. 46, 47), and the Act of March 27, 1947 (Session Laws of Alaska, 1947, C. 84, p. 220), under which appellees claim, is that the

earlier act specifically limited this allowance to actions in the district court.

CONCLUSION.

We respectfully submit that the general mining law of the United States was restored to Alaska with respect to the burden of proving forfeiture by the 1938 Act; that appellant was unable to meet that burden; that the jury's verdict and the judgment of the district court are correct; that The Snow Shoe Fraction location is valid; that the attorney's fees were properly allowed; and that the judgment of the district court should be affirmed.

Dated: January 28, 1949.

Respectfully submitted,
SOUTHALL R. PFUND,
CHARLES J. CLASBY,
Attorneys for Appellees.

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

United States
Court of Appeals
for the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

vs.

UNITED STATES SMELTING, REFINING AND
MINING COMPANY, a corporation, FIRST
NATIONAL BANK OF FAIRBANKS, Executor
of the Estate of GUSTAF SODERBLOM, deceased,
and WALTER JENSEN,

Appellees.

Appellant's Reply Brief

Harold Banta
Hallock, Donald, Banta & Silven
Baker, Oregon
Attorneys for Appellant

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MAR 7 - 1949

PAUL P. O'BRIEN,

FILED

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EMMA GRACE LOWE, Appellant,
vs.
UNITED STATES SMELTING, REFINING
and MINING COMPANY, et al, Appellees.

APPELLANT'S REPLY BRIEF

Reply to Appellees' Statement of the Case

At the top of page four of appellees' brief appear certain quotations from pages ten and eleven of appellant's opening brief regarding which appellees' counsel charge:

"These statements are gratuitous, unsupported by any evidence in the transcript, and fly in the teeth of the verdict. (Tr. pp. 46-47) and the Findings of Fact (Tr. pp. 58-9) to the effect that all required labor was done."

We must take sharp issue with this contention. The Bill of Exceptions, duly approved and settled by the trial judge, amply supports the quoted matter in appellant's brief. (pp. 87-135 Tr. of Record) We direct attention particularly to exceptions numbered one to four inclusive, pages 88 to 102 Transcript. Space does not permit of extended quotation, but for convenient reference a quotation from Exception No. 4 has been set out on page 1 appendix and should be sufficient.

If, as appellant contends, the Waskey Act has not been impliedly repealed, so that no resumption of work is permitted, and in the absence of proper and timely filing of proofs of labor the burden of proof was shifted to the appellees to show that the work was done, then it is quite obvious that there has been a complete failure

of proof on the part of appellees, and appellant's motions for non-suit and demurrer to the evidence made at the close of plaintiff's case in chief (pp. 89, 90 Tr. of R.) and the motions for non-suit and for directed verdict at the close of all the evidence (p. 102 Tr.) should have been granted,

The purpose of this portion of appellees' brief seems to be to induce the court in the event the case is reversed to send the matter back for a new trial instead of directing a judgment of dismissal. Appellant would most vigorously oppose any such outcome. Appellees are the moving parties in these cases. The trial in the court below consumed eight days (August 6 to 15, 1947. See pp. 63-64 Tr.) Both parties had ample opportunity to present their respective contentions. If appellant's theory is correct, this case should have been terminated by dismissal, either through a non-suit or directed verdict in the lower court. It is submitted that if she prevails on this appeal, such a dismissal should now be directed. We direct attention to the quotations from 5 Corpus Juris Secundum, Title "Appeal and Error," Sec. 1927 and 1928, p. 1435, and 1437 appearing on page 2, appendix

Identical statements will be found in 4 Corpus Juris at pages 1189 and 1190. While appellees do not raise the point it may perhaps be well to point out that although tried with an advisory jury, these were equity suits, not actions at law. There is accordingly no prohibition upon the court under the 7th Amendment to the Federal

Constitution as construed in the case of *Slocum vs. New York Life Insurance Company*, (228 U. S. 364, 33 Supreme Court 523) against rendering a final decree of dismissal. While we are certainly making no bid for sympathy from this court on that account, appellant is a private individual with limited means. She is not a multi-million dollar corporation like the principal appellee, United States Smelting, Refining and Mining Company. As will be apparent from the record, the trial of these cases below and the expense of this appeal have already been a severe burden upon her. A judgment of reversal, merely sending the case back for retrial, followed by another protracted trial in the district court and the possible prospect of a further appeal, would, from her standpoint, be almost as great a calamity as an affirmance. The one advantage which a large organization enjoys in litigation against a private individual is that to the organization, expense and delay may mean little, while to the individual they are frequently everything. We most urgently request that if appellant's contentions are sustained, the cases be settled here and not sent back for a retrial.

Reply to Appellees' Argument on Implied Repeal of the Waskey Act

This portion of appellees' brief (pp. 5 to 29) covers a number of different points and it is believed that our reply thereto may be rendered easier to follow if we undertake to split the material up into three subheads.

(a) *Shifting Burden of Proof*: The italicized portion of the statement appearing on page 8 of appellees' brief:

"A claimant who proves a valid mining location has made a prima facie case *that as of the date of his pleading he has maintained his claim in good standing by performing the annual labor.*"

and subdivision (b) of appellees' table on page 14, both arise as the result of the same fundamental error apparent in the District Court's decision and discussed on pages 42-45, appellant's opening brief.

There is no question at all but that in Alaska, Oregon and elsewhere throughout the mining states, forfeiture is an affirmative defense and the burden is upon the party asserting it to plead and prove it in the first instance. *Hammer vs. Garfield Mining Company*, and the other authorities cited on page 7 of appellees' brief, are good law. They represent the rule in jurisdictions having proof of labor statutes like Alaska's Waskey Act as well as states that do not. The first two cases in counsel's list are California cases, yet as appears from one of them, *Harris v. Kellogg*, 117 Cal. 484, 49 Pac. 708, California at that time had a proof of labor statute much more drastic in its provisions than even the Waskey Act. Under the then California law, the proof of labor had to be filed:

"Within thirty days after the time limited for performing such labor or making such improve-

ments, and that upon failure to do so, the mine shall be open to relocation.” (49 Pac. 709)

The basis for the rule announced by these authorities, is succinctly stated in the early Oregon case of *Bishop vs. Baisley*, 28 Oregon 119, 41 Pac. 937. See quotation page 3, appendix.

The above case is cited as authority for the same rule by this court in the case of *Cache Creek Mining Co. v. Brahenberg*, (CCA 9th) 217 Federal on 241:

“A forfeiture must be set up before it can be insisted upon. (*Bishop v. Baisley*, 28 Oregon 119, 41 Pac. 936)”

This case was an appeal from Alaska and was decided in 1914, long after the Waskey Act was in effect there.

What these cases hold, and all that they hold, is that the rights arising from the location of a mining claim continue until a forfeiture is shown. This makes forfeiture an affirmative defense, and casts the burden upon the party claiming a forfeiture to allege and prove it. There is no support in any of the authorities for the statement quoted from p. 8 of appellees' brief and their case of *Renshaw v. Switzer* (Mont) 13 Pac. 127, contains an excellent statement of the basis for the rule in terms very similar to those announced in *Bishop v. Baisley* at the bottom of page 127 and the top of 128.

Indeed, appellees' counsel are arguing in a circle

when they make such an assertion. If, as shown, forfeiture is an affirmative defense and must be affirmatively alleged and proved by the party relying on it, there is no occasion for the claimant under the original location to make out a *prima facie* case of performance and no reason for any presumption that he has done the work.

But, although these authorities announce the rule that forfeiture is an affirmative defense which must be pleaded and proved, and accordingly, the party alleging forfeiture has the primary burden of proof to establish it, they do not in any way suggest how the party having that burden shall sustain it or that the initial burden of proof may not, in a proper case, and on a showing of appropriate facts, *be shifted*. Space limitations upon this reply brief do not permit of any elaborate technical discussion or fine spun distinctions, but it is well established that the original burden of proof, or as it should perhaps more accurately be called, the burden of going forward with evidence, frequently shifts during the course of the trial. See 20 American Jurisprudence, Title "Evidence", Section 132 and 133, pages 134 to 136, 31 Corpus Juris Secundum, title "Evidence", Sections 110 and 111, page 718 to 720. This is precisely the effect of such statutes as Alaska's Waskey Act and the similar statutes in force in the states of New Mexico, Idaho and now Oregon. (See pages 44 to 48 Appellant's Opening Brief) *They shift the burden of proof*.

In the present cases, appellant under the rule an-

nounced by *Hammer v. Garfield Mining Co.*, *Bishop v. Baisley* and similar cases, being the party alleging and claiming the forfeiture had the primary burden of proving it, but when proof was produced or offered that proofs of labor were not filed, the burden of proof under the express provisions of the Waskey Act was shifted to appellees:

“Such affidavits shall be prima facie evidence of the performance of such work or making of such improvements, *but if such affidavits be not filed within the time fixed by this act, the burden proof shall be upon the claimant to establish the performance of such annual work and improvements.*” (p. 10 appellees’ brief.)

Before leaving this subject, it may be well to again discuss briefly the purpose and effect of this proof of labor phase of the Waskey Act and similar statutes. The General Mining Laws of the United States made applicable to the Territory of Alaska by the Act of June 6th, 1900 (p. 15 appellant’s opening brief, p. 8 appellees’ brief) contain no provisions for filing proofs of labor and under such General Laws the filing or failure to file a proof of labor *has no evidentiary value either way*. This is a subject to which the General Mining Laws do not extend. The Waskey Act, *in the same sentence*, provides:

1. That the affidavit if filed shall be prima facie evidence of the performance of the work.

2. If not filed it shifts the burden of proof upon the claimant to show that the work was done, or, in other words, and as set forth in the Idaho and Oregon Statutes; it shall be prima facie evidence that the labor has not been done. (See page 45 appellant's opening brief, and Sec. 108-315 Oregon Compiled Laws Annotated.

All these laws in fact mean substantially the same thing, although the wording of the Alaska and New Mexico Acts uses the term "burden of proof", while the Oregon and Idaho statutes refer to "prima facie evidence." Now it will be apparent at once on a moment's reflection, that since the General Mining Laws contain no provision for filing proofs of labor at all, there would be exactly the same ground for arguing that the first clause of the sentence which makes the affidavit when filed prima facie evidence that the work was done, is contrary to the General Mining Laws, as there is for saying that the second clause is, which makes the failure to file prima facie evidence that the work was not done, or stated otherwise, shifts the burden of proof to the claimant to show that it was. If one provision of the Act contravenes the General Mining Laws, *it follows inescapably that the other must, because both do exactly the same thing*; that is, legislate upon a subject not previously covered by those laws. Yet appellees' counsel do not for a moment intimate that the first clause of the sentence is invalid, (See page 11, appel-

lees' brief) and appellees themselves claimed the benefit of this clause when they undertook to, and did, introduce their proofs of labor for the years 1938-9, 1939-40, 1940-1, plaintiff's exhibits "X", "Y", and "Z" in an effort to show resumption of work. (See exception No. 8, pages 116 to 131 'Tr.) If appellees' contentions were correct, and this provision of the Waskey Act had in fact been contrary to the General Mining Laws, and impliedly repealed in 1938 as they so vigorously assert, then these proofs of labor would be mere voluntary ex parte affidavits and there would have been no basis whatever for admitting them. Appellees' counsel, in other words, *rely upon the favorable prima facie effect of a proper filing during certain years while they vigorously oppose the unfavorable effect of failing to file during previous years.*

Now the purpose of all this discussion and its effect on the present appeal is simply this. As pointed out in appellant's opening brief, page 35, the Waskey Act covers two separate matters. First, it provides for the filing of proofs of labor and their contents, makes the affidavits prima facie evidence if filed and shifts the burden of proof if they are not filed. Secondly, it provides that upon failure to do the work the claim becomes automatically forfeited.

The second aspect of the Waskey Act, the automatic forfeiture provision, was held inconsistent with and to impliedly repeal the resumption of work doc-

trine of the General Mining Laws in *Thatcher v. Brown*.

The first phase of the Waskey Act, which we are now discussing, that is, the evidentiary effect of filing or failing to file *is not inconsistent with the General Mining Laws*. We stress again, as pointed out in our opening brief, pages 45 to 47, Alaska's Waskey Act appears to have been copied from the New Mexico Statute. There are now at least three states (Idaho, New Mexico and Oregon) in addition to Alaska, that have substantially identical laws. Of course, Alaska's Waskey Act, being a Congressional enactment would be valid whether in conflict with the General Mining Laws or not, but the validity of the state statutes could only be sustained if not in conflict with the Federal Mining Laws. See the quotation from *Upton v. Santa Rita Mining Co.*, 14 N. Mex. 96, 89 Pac. 275 on 287, set out at page 46, appellant's opening brief. The New Mexico court quotes from the second edition of Lindley on Mines. The third edition contains an identical statement. A quotation from Volume 2, Sec. 636, pages 1582 and 1583 of Lindley's Third Edition appears on page 4 of the appendix.

Therefore, since not in conflict with the General Federal Mining laws, these provisions of the Waskey Act would not be impliedly repealed in any event by the 1938 amendment when the General Mining Laws were, as the trial judge put it, "again put forward as the Law of Alaska."

As will more fully appear in our later discussion of appellees' point that "the repeal of the Waskey Act put the burden of proving forfeiture, before and after its repeal, on appellant" this phase of the matter really determines the present appeal.

(b) *Implied Repeal of Automatic Forfeiture Clause.* In considering appellees' authorities on this point, it is important to keep clearly in mind *exactly* what we are discussing here. We have, first, a general law, the Act of June 6, 1900, which extended the mining laws of the United States to the Territory of Alaska. (page 8, appellees' brief) Part of those Mining Laws was the doctrine of resumption of work. (page 6, appellees' brief) Secondly, we have the Waskey Act, *an independent intermediate statute*, (pp. 9-11, appellees' brief) which is inconsistent with the resumption of work doctrine and to that extent supercedes the former law. We stress that this is *an independent intermediate act*, because the rule might be entirely different if the Waskey Act, instead of being an intermediate act had been enacted as an amendment to the 1900 statute. Third, there is the 1938 amendment to the 1900 law which changes that law in certain particulars not involved here, and repeats the clause making the General Mining Laws applicable to Alaska.

By keeping these factors firmly in mind, we automatically eliminate most of the authorities cited in appellees' brief. For example, on page 16 there are cited

the two federal cases of *Heinze v. Butte & B. Consol. Mining Co.*, 107 Fed. 165, and *Columbia Wire Co. v. Boyce*, 104 Fed. 172. Both these decisions, one from the Ninth Circuit and the other from the Seventh Circuit, deal with identical statutes. However, there the intermediate act was not a separate enactment but had been enacted as an express amendment to the former law, and the third amendment omitted some of the provisions included by the second. Both cases are accordingly in the same class as *State v. Lightner*, which is discussed in detail on pages 20 to 22, appellant's opening brief.

Several of appellees' cases do not deal with an intermediate act at all but merely announce the rule (which appellant has never disputed) that where a subsequent act is inconsistent with a prior enactment, it impliedly repeals the prior law to the extent of the inconsistency. On analysis, about the only case cited that lends even surface support to appellees' contention, is *In re Metcalf's Estate*, cited and discussed on page 18. This case bases its decision upon a quotation from 59 *Corpus Juris* 926, Section 528, which recites as an exception to the general intermediate amendment rule the case "where the reenacting act and the intermediate act are wholly inconsistent with each other and cannot stand together, the intermediate act will be regarded as repealed."

This case, however, should not be construed as placing the state of Pennsylvania at variance with the

general rule as is apparent from the subsequent case of *In re Ferguson's Estate*, 325 Penn. 34, 189 Atlantic 289, which contains a most elaborate statement of the rule and the reasons for it, as well as an analysis of the absurd consequences that follow from adopting a contrary construction. We refer first to page 290, (see page 5 appendix). The case of *In re Metcalf's Estate* is distinguished on page 292, 189 Atlantic. (See appendix 6). Finally the court points out in most able and convincing language the absurd results that follow from applying the doctrine that a later reenactment would repeal a former intermediate act, where there were several amendments to both statutes. A nearly identical situation could well have existed in this case. There have been two recent amendments to the 1900 law, Sec. 381, Title 48, USCA, the 1938 amendment under discussion here and another in 1947. (Chap. 514, Section 1, 61 Statutes 916)

Suppose there had also been amendments to the Waskey Act in minor particulars; say in 1942 and 1948. Then which act would repeal the other and for how long?

Lastly, in the very recent case of *Petition of Indiana County*, decided November 8, 1948, and reported at 62 Atlantic 2nd, page 3, the Pennsylvania Supreme Court in a case substantially on all fours with this one applied and followed the Intermediate Amendment Rule and distinguished the *Metcalf* case upon the

ground that the Intermediate Act and the last amendment were not *wholly inconsistent* with each other. An analysis of and quotations from the Indiana County case will appear on page 8 of the appendix.

In the case at Bar it is, of course, at once apparent that the two acts in question, the Waskey Act and the 1938 amendment to the 1900 Law which again reiterates that the Federal Mining Laws are extended to the territory of Alacka could not be wholly inconsistent but at most only *partially so*. The Federal Mining Laws cover a large number of subjects other than the doctrine of resumption of work, which was impliedly repealed by the Waskey Act, and the Waskey Act is itself entirely consistent with the Federal Mining Laws in many respects. The two laws not only can stand together but have ever since 1907. The general mining laws except as expressly modified by the Waskey Act or other similar statutes have been and still are extended to and the law of the territory of Alaska.

Before closing on this phase it may be well to mention certain cases discussed by Judge Pratt, although not referred to in appellee's Brief. Judge Pratt discusses the so-called exception under his Point IV (West Publishing Company's Point 5) on pages 922-923 of 74 Federal Supplement. The Judge cites the case of Hawes vs. Fliegler (Minn.) 92 N. W. 223. To the quotation set out in the Federal Supplement we would like to add the following from page 224: "A

statute amending a previous act, while it may not ordinarily affect an intermediate law, if its terms give best expression to the legislative will, might be held to do so if a reasonable regard for the apparent purpose of the lawmakers required that result."

To the same effect is the subsequent case of *State vs. Klasen* (Minn.) 143 N. W. 984 on 985. (see 74 Fed. Sup. 923)

The trial Judge also cites *Buchsbaum and Co., vs. Gordon* (Ill.) 59 N. E. 2nd 832, from which we quote on page 837:

"In all cases the primary question is the intention of the Legislature rather than any technical priority of the passage of the Acts."

These Minnesota and Illinois cases while recognizing the Intermediate Amendment rule as will appear from their own recitals as well as other decisions from the same jurisdictions (see *Powell vs. King* (Minn.) 80 N. W. page 850; *Nelson vs. Itasca County* (Minn.) 155 N. W. 752 on 754; *Hall vs. Village of Aurora* (Minn.) 196 N. W. 465 on 466, and *Klemme vs. Drainage District* (Ill.) 43 N. E. 2nd 966 on 968) stress the proposition that the rule is a canon of construction only and must yield to the true legislative intent if it can be ascertained.

If we are to be governed by the actual intent of Congress then it is perfectly obvious, of course, that the only changes intended by Congress in passing the

1938 amendment were those regarding mining on and below tide water lands. This will appear from the report accompanying the Bill in the Senate which is set out in full in the appendix at pages 10-20. It is very clear from this report that Congress never had the remotest intimation that the amendment would be held to impliedly repeal the Waskey Act or similar laws or any intention to affect that Act in any particular.

(c) *Effect of Implied Repeal on Other Laws:* Appellees' counsel assume (see pp. 12, 13 and 27, Appellees' Brief) that the only effect of the implied repeal of the automatic forfeiture provision of the Waskey Act will be to restore the resumption of work doctrine in Alaska and make the law of Alaska, in this regard, the same as that of other states. Appellees overlook however, that the Waskey Act *is only one of a series of special mining laws applicable to Alaska which modify or conflict with the General Mining Laws to a greater or lesser extent.* We will refer briefly to one of the others.

(1) Title 48, Sec. 386, U. S. C. A. (passed in 1910) extends the time for filing adverse claims until eight months after the close of the sixty day period of publication and the time for filing adverse suits until sixty days after the adverse claim is filed in the land office. Under the General Mining Laws, Title 30, Secs. 29 and 30, the adverse claim must be filed during the period of publication and the adverse suit within thirty days thereafter. If appellees were right, and the 1938

amendment wiped out everything in conflict with the General Mining Laws, *then these cases were commenced too late and the lower court never had jurisdiction to hear them in the first place.* (See Tr. pp .4, 5, 8, 9, 10, Smith v. Wheeler, 5 Alaska 282)

Accordingly, if appellees contentions are correct, and the 1938 amendment wiped out the automatic forfeiture clause of the Waskey Act because in conflict with the General Mining Laws, *then each and every one of these other statutes, including Sec. 386 were also wiped out because they are equally in conflict.*

Reply to Appellees' Point "The Repeal of the Waskey Act Put the Burden of Proving Forfeiture Before and After its Repeal on Appellant"

This point of appellees is important because of the admissions counsel make in their argument under it. They appear to concede (pp. 31-2) that the implied repeal of the automatic forfeiture clause in the Waskey Act in 1938 would not revive locations that had been forfeited by failure to do the work during the years prior to 1938 while the Act was admittedly in force. Appellees state "In the second proposition (Ap. Br. pp. 29-34) appellant argues that *appeal* (repeal) cannot affect rights vested or revive rights lost under the repealed statute. *Assuming that to be true, we fail to see what bearing it has on this case.*" (page 31 appel-

lee's brief) "No one but appellant has suggested that substantive rights might be revived by repeal." (p. 32)

As previously shown the automatic forfeiture clause of the Waskey Act is entirely separate from the provisions providing for the filing of proofs of labor and the evidentiary effect of filing or failure to file. The automatic forfeiture clause is in conflict with the resumption of work doctrine of the General Mining Laws, but the provisions for filing proofs of labor and the effect of failure to file upon the burden of proof are not in conflict with any provision of such mining laws. Therefore, appellant must prevail in this case whether the automatic forfeiture provision was impliedly repealed in 1938 or not. All the many years for which there was no proof of the performance of annual labor and in connection with which the failure to file proofs of labor shifted the burden of proof to the appellees, were prior to 1938. (See Ex. No. 4, pp. 100-102, Tr.)

Reply on Validity of Snowshoe Fraction Location

The following points are to be made in connection with the authorities cited by appellees under this point on pages 34 and 35 of their brief. First, all of appellees' authorities deal with *quartz claims*. The entire Chapter 2, of which Article 7 and Section 373 are a part, (p. 731, Lindley) deals with "lode claims or deposits in place." The cases of *Crown Point Mining Co. v.*

Buck; Doe v. Tyley and Upton v. Santa Rita Mining Co., all dealt with *quartz claims*. (See 97 Federal, 463 14 Pac. 375 and 89 Pac. 276) A very different rule applies as to placers as will appear from the quotations from Lindley and Stenfjeld v. Espe set out on page 21, appendix.

Second, in the cases appellees cite, the overlap was slight and inadvertent and there was good reason for the mistake. In Doe v. Tyley, the locations were made in the night time. (14 Pac. 375) In this case, the overlap is not slight. It covers three times the area open to location. The point is, that under Federal Mining Laws, the boundaries of this irregularly shaped claim, not located according to legal subdivisions, had to be marked on the ground so that they could be readily traced. (See Lindley on Mines, 3rd. Ed. Sec. 454, pp. 1069 and 1070) The lines of the Snow Shoe Fraction as now claimed, were never so marked. This claim is now described as a small triangle containing approximately two and a half acres. The area marked was a rectangle some four times as large, containing ten acres. The quotation from Stenfjeld vs. Espe, appendix p. 22, is particularly appropriate. The difference between the claim mentioned in the Espe case and the one involved here is one entirely of degree, not of principle. There the overlapping claim was forty acres in extent, here it was ten.

Reply to Appellees' Argument on Attorneys' Fees

On page 51 of appellant's opening brief it is stated: "The writer cannot find where this attorney fee clause has ever been construed by this court, or any reported decision of the Alaska District Courts." We obviously did not look hard enough. It now appears that we inadvertently broached a subject upon which the authorities are squarely in conflict, and this Court seems to be pretty definitely committed to a position in opposition to the Oregon cases upon which we relied. (See 20 Corpus Juris Secundum, p. 463, Sec. 219; 15 Corpus Juris, p. 118) Upon further consideration, we see no object in further pursuing this highly controversial point although the writer still feels that the authorities requiring independent proof of attorneys' fees state the better rule. It is noted that the Alaska statute applies equally to both plaintiffs and defendants and since the Trial Court has fixed the attorney fee to be allowed the plaintiffs at \$500.00, without pleading, cost bill or proof, we take it that "What is sauce for the goose is sauce for the gander" and that if the appellant prevails on this appeal she is, as of course, entitled to a like award of attorneys' fees against the appellees.

Respectfully submitted,

HAROLD BANTA

Hallock, Donald, Banta & Silven

Attorneys for Appellant

Excerpt from Exception No. 4:

“During the trial of these cases, the plaintiffs offered no testimony or evidence regarding the performance or non-performance of the annual labor and assessment work upon either of the claims involved in these actions, the L Association and Snow Shoe Fraction, during any of the years prior to the fiscal year beginning July 1, 1838, and offered in evidence no proofs of labor or suspension notices covering any of such years prior to said fiscal year. The defendant offered to prove, as set out in Exceptions No. 2 and 3, that no proofs of labor or suspension notices were filed covering either claim prior to the year 1914; that a proof of labor on the Snow Shoe alone was filed in 1915; nothing was filed for either claim in 1916 *** that there was no affidavits of labor filed or intentions to hold on the Snow Shoe claim except for the years 1915, 1917, 1918, 1919, 1923, 1928, 1939 and 1934, and that there were no affidavits of labor filed and no exemptions of labor or suspension notices filed for the years 1909, 1910, 1911, 1912, 1913, 1914, 1916, 1920, 1921, 1922, 1924, 1925, 1926, 1927, 1930, 1931, 1932, 1933, 1936, 937, and 1938 upon the L Association claim. (pp. 100-101 Tr.)”

Quotation from 5 Corpus Juris Secundum, page 1435, sec. 1927:

“Substantially the same is the rule, confirmed by statute in some jurisdictions, that the Appellate Court will render or order the proper judgment for defendant or against plaintiff, where the Trial Court should have sustained a demurrer to plaintiff’s evidence or should have, under the evidence, directed a verdict or given a peremptory instruction for defendant.”

And on page 1437, Sec. 1928:

“The rule permitting the Appellate Court to order or direct a dismissal or non-suit *is especially applicable where the lower court should have entered an order of dismissal or non-suit.*”

Quotation from Bishop vs. Baisley, 28 Ore. on 126-7:

“A mining claim subsequent to a valid location is property in the highest sense of the term. It may be bought and sold, and will pass by descent. It carries with it the ‘exclusive right of possession and enjoyment of all the surface included within the lines’ of location. The right is a valuable one, and is protected by law. It continues until there shall be a failure to represent the claim; that is, to do the requisite amount of work within the prescribed time. The right of possession and enjoyment acquired by location is kept alive by the representation prescribed by law, but, when not thus kept alive, the right is forfeited, and the claim is thereafter open for relocation. In order, therefore, to secure a valid location, *it must be established that rights acquired under a prior one upon the same claim have been forfeited. The affirmative of this proposition is always cast upon the party seeking to establish it, and hence, under the rules of pleading, it must be specially pleaded, where opportunity is offered, before a party can be heard to support it with evidence.*” (Citing many cases, including Hammer v. Garfield and Quigley v. Gillett)

Quotation from Lindley on Mines, 3rd Ed., pp. 1582-3:

“In Idaho it is provided that the failure to file such an affidavit shall be considered *prima facie* evidence, that the requisite labor has not been performed, and likewise in New Mexico, such failure places the burden of proof upon the owner or owners of such claims to show that such work had been done according to law. Ordinarily the burden of proof rests with the party charging a forfeiture to show that the work has not been performed by the previous locator. In Idaho and New Mexico where there is a failure to file the proof of annual labor, or where it is not filed in time or the affidavit is defective, *this rule is modified and the burden is shifted. We cannot see any objection to this class of state legislation. The several states have the right to define the nature, degree and effect of evidence, within rational limits, and we do not think these provisions unreasonable.*”

In re Ferguson's Estate, 325 Penn. 34, 189 Atlantic 289, from page 290:

“In re Toner's Estate, 260 Pa. 103 A 541, 544, the court dealt with the contention of implied repeal in circumstances quite like those now presented and quoted the well known rule which must now be applied. The court said: “It is established that: ‘Where a statute merely re-enacts the provisions of an earlier one, it is to be read as part of the earlier statute, and not of the re-enacting one, *if it is in conflict with another passed after the first but before the last act; and therefore it does not repeal by implication the intermediate one.*’ Endlich on the Interpretation of Statutes, 194, or as expressed in 36 Cyc. 1084: ‘Nor does a later law, which is merely a re-enactment of a former, repeal an intermediate act which qualifies and limits the first one, but such intermediate act will be deemed to remain in force, and to qualify or modify the new act in the same manner as it did the first.’ See, also, Lewis’ Sutherland on Statutory Construction, Sec. 273, and In re Searight's Estate, 163 Pa. 210, 216, 218, 29 A. 800.” 260 Pa. 49, 57, 103 A. 541. That principle is peculiarly applicable to the construction of both the Fiscal Code and the Fiduciaries Act and their relation to each other as indicating legislative intent.”

Page 292, 189 Atlantic:

“The Commonwealth cited *In re Metcalf’s Estate* (1935) 319 Pa. 28, 179 A. 587, in support of its position. In that case it was held that the Fiduciaries Act by implication repealed section 7 of the Act of June 1, 1915, P. L. 661, 71 P. S. Section 1787, on the ground that the provisions of section 7 dealt with the distribution of an insolvent estate. It provided that when a claim was made on behalf of the Commonwealth, or on behalf of any county or poor district, for reimbursement of moneys expended by the state, county, or poor district in the maintenance of insane, feeble minded, or other persons confined in institutions of the Commonwealth, the state and county should share in the proportion of the amount of maintenance expense. Section 13 (a) of the later act expressly dealt with the same subject and was so inconsistent with it that both could not stand. It was held that the Commonwealth must be last paid.

“It cannot be supposed, although this is what the Commonwealth’s argument comes to, that in 1811, for example, the Legislature intended by implication to modify the provision of the Act of 1794 governing the distribution of an insolvent decedent’s estate, and subsequently, by the dece-

dents' estate legislation of 1834, intended by implication to modify the taxing act of 1811 by restoring the provisions of the Act of 1794, and thereafter from time to time to repeat this conflict between the taxing and the decedents' estates legislation in 1879, 1917, and 1929. If such radical departure from legislative policy had been intended by the Fiscal Code, it would have been clearly indicated in the title as required by article 3, section 3, of the Constitution. While the title, abstractly considered, is very comprehensive, it must be construed in the light of the established legislative policy of the state which, as to the decedents' estate legislation, was established long before the Constitution of 1874, and since that time has been recognized as a well defined body of our law."

Analysis and Quotations from Petition of Indiana County (Penn. Nov. 8, 1948) 62 At. 2nd 3, on pages 4 and 5.

An original act of 1931 allowed two years redemption period from tax sales. A separate act passed in 1941 retained the basic two years period but changed the law by extending that period in certain cases, just as the Waskey Act retained some provisions of the General Mining Laws and changed others (resumption of work doctrine) then a third act of 1945 amended the original act of 1931 and repeated the general two year limitation period. The court says:

“The act of May 24, 1945, (P. L. 945) was an additional amendment to the Act of 1931; *it did not refer to the Act of 1941 at all*; *** It would seem clear that when there is applied to these successive acts the well established canons of statutory construction it cannot validly be maintained that the act of 1941 was repealed by the Act of 1945. When a statute reenacts the provisions of an earlier one it is to be read as part of the earlier statute and not of the reenacting one, *if it is in conflict with another passed after the first but before the last act*; therefore, it does not repeal by implication the intermediate one, but the intermediate act will be deemed to remain in force and to qualify or modify the new

act in the same manner as it did the first.” (Citing authorities) (page 4) *** “Of course, if the Act of 1945 and the intermediate Act of 1941 were *wholly inconsistent* with each other, the Act of 1941 would necessarily have to be regarded as repealed. In re Metcalf’s Estate, 319 Pa. 28, 32, 179 Atl. 587, 588, but such is not the case and the provisions of the Act of 1945 and must therefore be considered as written into the original Act of 1931 as amended, leaving untouched the Act of 1941.” (Page 5)

CALENDAR NO. 1743, 75th Congress, 3rd Session, SENATE, Report No. 1676 — CIVIL GOVERNMENT OF ALASKA — April 20 (calendar day, April 29), 1938.—Ordered to be printed.

Mr. Clark, from the Committee on Territories and Insular Affairs, submitted the following

R E P O R T

[To accompany H. R. 7778]

‘The Committee on Territories and Insular Affairs, to whom was referred the bill (H. R. 7778) to amend section 26, title 1, chapter 1, of the act entitled ‘An act making further provision for a civil government of Alaska, and for other purposes,’ approved June 6, 1900, having considered the same, report thereon with a recommendation that it do pass with the following amendments:

Page 1, line 10, after the comma following the word ‘That’, strike all of the remainder of the line and strike all of line 1 on page 2 and insert in lieu thereof ‘subject only to the laws enacted by Congress for the protection and preservation of the navigable waters of the United States,’

Page 2, line 24, after the word ‘order,’ strike out the remainder of the line and all of line 25 up to but not including the semicolon.

And that as so amended the said bill do pass.

The proposed amendments have been requested by the War Department in a letter dated January 22, 1938, addressed to the chairman of the Senate Committee on Territories and Insular Affairs.

The purposes of the bill are disclosed by the House report thereon, which embraces a letter dated October 14, 1937, from the Secretary of War addressed to the chairman of the House Committee on the Territories, stating that the Department has no objection to the passage of the bill if amended as suggested in that letter. The amendments then so recommended by the Secretary of War and mentioned in the House report were incorporated in the bill in the House.

The letter dated January 22, 1938, addressed to the Senate Committee on Territories and Insular Affairs, requesting the amendments hereinabove recommended, and the House report on the bill, which embraces the letter dated October 14, 1937, addressed by the Secretary of War to the chairman of the House Committee on the Territories, are as follows:

War Department,
Washington, 22, 1938.

Hon. Millard E. Tydings,

Chairman, Committee on Territories and
Insular Affairs,

United States Senate, Washington, D. C.

Dear Senator Tydings: The Department refers to H. R. 7778, Seventy-fifth Congress, first session, a bill to amend section 26, title 1, chapter 1, of the act entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900, recently passed by the House of Representatives and now before your committee.

At the request of the Honorable Lex Green, chairman of the Committee on the Territories, House of Representatives, the Department, under date of October 14, 1937, submitted a report on this bill. There is enclosed herewith a copy of this report, together with a copy of the bill as amended in red by the Department and submitted with the report.

The bill as passed by the House was not amended in line 10, page 1, and lines 1, 24 and 25, page 2, as recommended by this Department. The Department is advised that the failure to amend the bill as recommended by the Department was not intentional. It is believed that the changes are appro-

priate and that they are needed to clarify the purpose of the proposed legislation. The Bureau of the Budget, in its report to the Department under date of September 28, 1937, did not object to such amendments.

It is accordingly recommended that the bill if enacted be amended to include these changes.

Sincerely yours,

HARRY H. WOODRING,
Secretary of War.

[H. Rep. No. 1648, 75th Cong., 3d sess.]

The Committee on the Territories, to whom was referred the bill (H. R. 7778) to amend section 26, title 1, chapter 1, of the act entitled 'An act making further provision for a civil government of Alaska, and for other purposes,' approved June 6, 1900, report it back to the House with the recommendation that the bill be amended as follows:

Page 2, line 15, strike the word 'War' and insert in lieu thereof 'the Interior.'

Page 2, line 23, strike the word 'War' and insert in lieu thereof 'the Interior.'

And that as so amended the said bill do pass.

By the provision of section 26 of the act of Congress approved June 6, 1900 (31 Stat. 329), the

laws of the United States relating to mining claims were extended to Alaska and provision was therein made that all land and shoal water between low and mean high tide on the shores, bays, and inlets of Bering Sea, within the jurisdiction of the United States, should be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become citizens of the United States. The act further provides that the Secretary of War may prescribe such general rules and regulations as are necessary for the preservation of order and the protection of the interests of commerce. It will be noted that the mining on tide lands, authorized by the act, embraced only the tide lands of the shores of Bering Sea and not all of the tide lands of Alaska. *The bill as introduced, sought to amend section 26 in only one particular, by extending the authority to mine the tide lands of all of the shore waters of Alaska.*

Upon the introduction of the bill, it was referred to the Secretary of War for the customary departmental report thereon. By letter addressed to the chairman of this committee dated October 14, 1937, the Secretary of War recommends that the bill be amended by placing full control of mining on all shores, bays, and inlets of Alaska within the jurisdiction of the United States in the Department of

the Interior since it was deemed advisable to have all mining laws and regulations administered by the Secretary of the Interior rather than by partial control with respect to the mining of tidelands under the Secretary of War. The amendments hereinabove recommended will accomplish that purpose.

The Bureau of the Budget has no objection to the passage of the bill.

The letter of the Secretary of War recommending the amendment of the bill as above indicated and its passage as so amended, is as follows:

War Department,
Washington, October 14, 1937.

Hon. Lex Green,

Chairman, Committee on the Territories,

House of Representatives, Washington, D. C.

Dear Mr. Green: The Department refers to your request of July 19, 1937, for a report on House bill 7778 to amend section 26, title 1, chapter 1 of the act entitled 'An act making further provision for a civil government for Alaska, and for other purposes,' approved June 6, 1900.

Section 26 of the act of Congress approved June 6, 1900 (31 Stat. 329), extended the laws of the United States relating to mining claims, mineral locations, and rights incident thereto, to Alaska

and provided that all land and shoal water between low and mean high tide on the shores, bays and inlets of Bering Sea, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such. The law also provides that the Secretary of War may prescribe such general rules and regulations necessary for the preservation of order and the protection of the interests of commerce.

House bill 7778 proposes to extend the right to explore and mine for gold and other precious metals to all land and shoal water between low and mean high tide on all shores, bays, and inlets of Alaska within the jurisdiction of the United States. *This is the only amendment to Section 26 which is proposed.*

Since the Secretary of War is empowered to prescribe general rules and regulations necessary for the preservation of order and the protection of the interests of commerce, the Department advised the Bureau of the Budget on July 29, 1937, that it had no objection to the favorable consideration by Congress of House bill 7778. In response thereto, the Acting Director of the Bureau of the Budget forwarded to this Department a copy of a letter dated

August 20, 1937, which he received from the Assistant Secretary of the Interior suggesting that this bill be amended to place the control of mining on tidelands in the Department of the Interior, as this would be in accord with existing law governing the administration of mineral lands in Alaska.

A review of the past history of this legislation was made which showed that subsequent to the enactment of the original bill on June 6, 1900, rules and regulations were issued by the Headquarters Department of Alaska on July 14, 1900, providing for administration of the law by the commanding general of the Department of Alaska and by the nearest commander of the local military forces. Because of the withdrawal of military forces from stations adjacent to Bering Sea, these regulations were without means of administration and modified regulations were promulgated by the Secretary of War on August 21, 1934, providing for the administration of this law by the district engineer officer of the United States Army at Seattle, Wash. These regulations were submitted to the Secretary of the Interior for approval before being issued in view of the general supervision exercised by that Department over the government of Alaska.

In view of these facts and the suggestion made by the Acting Secretary of the Interior, this De-

partment advised the Bureau of the Budget that no objection to the proposed amendment of H. R. 7778 to place the control of mining on all shores, bays, and inlets of Alaska within the jurisdiction of the United States in the Department of the Interior could be foreseen if the bill were further amended as stated therein.

The Bureau of the Budget on September 28, 1937, replied that there would be no objection by that office to the submission of such a report on the above-mentioned bill to your committee, provided such a report included the suggestion made by the Secretary of the Interior, and in which this Department acquiesced, placing the control of mining of tidelands in Alaska in the Department of the Interior.

Sincerely yours,

HARRY H. WOODRING
Secretary of War.

In compliance with clause 2a of rule XIII, existing law is printed below in roman with matter proposed to be omitted enclosed in black brackets and new matter proposed to be inserted printed in italic:

‘Sec. 26. The laws of the United States relating to mining claims, mineral locations, and rights

incident thereto are hereby extended to the Territory of Alaska: *Provided*, That subject only to such general limitations as may be necessary to exempt navigation from artificial obstructions, all land and shoal water between low and mean high tide on the shores, bays, and inlets of [Bering Sea] *Alaska*, within the jurisdiction of the United States, shall be subject to exploration and mining for gold and other precious metals by citizens of the United States, or persons who have legally declared their intentions to become such, under such reasonable rules and regulations as the miners in organized mining districts may have heretofore made or may hereafter make governing the temporary possession thereof for exploration and mining purposes until otherwise provided by law: *Provided further*, That the rules and regulations established by the miners shall not be in conflict with the mining laws of the United States; and no exclusive permit shall be granted by the Secretary of [War] *the Interior* authorizing any person or persons, corporation or company, to excavate or mine under any of said waters below low tide, and if such exclusive permit has been granted it is hereby revoked and declared null and void; but citizens of the United States or persons who have legally declared their intention to become such shall have the right to dredge and mine for gold or other

precious metals in said waters, below low tide, subject to such general rules and regulations as the Secretary of [War] *the Interior* may prescribe for the preservation of order and the protection of the interests of commerce; such rules and regulations shall not, however, deprive miners on the beach of the right hereby given to dump tailings into or pump from the sea opposite their claims, except where such dumping would actually obstruct navigation, and the reservation of a roadway sixty feet wide under the tenth section of the Act of May 14, 1898, entitled "An Act extending the homestead laws and providing for the right of way for railroads in the District of Alaska, and for other purposes", shall not apply to mineral lands or town sites.' "

Quotations from Lindley & Stenfjeld vs. Espe:

“The reasons assigned by the courts for permitting junior lode claimants to place the lines of their locations upon or across lands which have been previously appropriated, a matter fully discussed in preceding sections, do not apply with equal force to placers.” (Lindley on Mines 3rd Ed. Vol. 2, p. 1055)

Stenfjeld v. Espe (C. C. A. 9th) 171 Fed. on 828:

“This ruling is based upon considerations which have no application whatever to placer locations. In the placer mine the surface is the thing located, and the possession of the surface is absolutely essential to the mining operations. In order to obtain the surface that is open to location, there is no necessity to invade the surface of other claims or to place boundary lines thereon.*** *No reason can be suggested for permitting a junior locator of a placer claim to lay his lines across a claim already located.*”

Stenfjeld vs. Espe, 171 Fed. on 828:

“The plaintiffs in error found the land in controversy, unmarked and unoccupied. Surrounding it they found other valid claims. They had the right to assume that the land was vacant and unappropriated. It would be an intolerable burden if the prospector who finds an unoccupied parcel of land, this surrounded by other locations, were required to search the surrounding country to ascertain whether the locators of an association claim had not placed four posts, one half a mile distant from each other, with the intention of appropriating segregated fractions of land lying between the boundaries of subsisting claims.”

No. 11,953

IN THE

United States Court of Appeals
For the Ninth Circuit

EMMA GRACE LOWE,

Appellant,

VS.

UNITED STATES SMELTING REFINING AND
MINING COMPANY, a corporation, FIRST
NATIONAL BANK OF FAIRBANKS, Executor
of the Estate of Gustaf Soderblom, and
WALTER JENSEN,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

SOUTHALL R. PFUND,

Standard Oil Building, San Francisco 4, California,

CHARLES J. CLASBY,

Fairbanks, Alaska,

*Attorneys for Appellees
and Petitioners.*

PILLSBURY, MADISON & SUTRO,

ALLAN R. MOLTZEN,

Standard Oil Building, San Francisco 4, California,

Of Counsel.

FILED

JUL 20 1949

PAUL P. O'BRIEN,
CLERK

No. 11,953

IN THE
United States Court of Appeals
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EMMA GRACE LOWE,

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UNITED STATES SMELTING REFINING AND
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of the Estate of Gustaf Soderblom, and
WALTER JENSEN,

Appellees.

APPELLEES' PETITION FOR A REHEARING.

*To the Honorable William Healy, Homer T. Bone, and
Walter L. Pope, Circuit Judges of the United States
Court of Appeals for the Ninth Circuit:*

We respectfully ask a rehearing of this case because the burden of proof provisions of the Waskey Act *are* in irreconcilable conflict with "The laws of the United States relating to mining claims, mineral locations and rights incident thereto," as enunciated in *Hammer v. Garfield Min. Co.* (1889) 130 U.S. 291, and faithfully followed by the courts in the following cases since 1889:

Book v. Justice Min. Co. (D.Nev. 1893) 58 Fed. 106;
Justice Min. Co. v. Barclay (D.Nev. 1897) 82 Fed.
 554;

Walton v. Wild Goose Mining & Trading Co. (9 Cir.
 1903) 123 Fed. 209;

M'Culloch v. Murphy (D.Nev. 1903) 125 Fed. 147;

Willitt v. Baker (W.D.Ark. 1904) 133 Fed. 937;

Zerres v. Vanina (D.Nev. 1905) 134 Fed. 610;

M'Kay v. Neussler (9 Cir. 1906) 148 Fed. 86;

Wailes v. Davies (D.Nev. 1907) 158 Fed. 667;

Moodey v. Dale Consol. Mines (9 Cir. 1936) 81 F
 (2d) 794 (cert. den. 299 U.S. 549);

Johnson v. Young (1893) 18 Colo. 625, 34 Pac. 173;

Strasburger v. Beecher (1897) 20 Mont. 143, 49 Pac.
 740;

Harris v. Kellogg (1897) 117 Cal. 484, 49 Pac. 708;

Power v. Sla (1900) 24 Mont. 243, 61 Pac. 468;

Crown Point Gold-Min. Co. v. Crismon (1901) 39
 Or. 364, 65 Pac. 87;

Callahan v. James (1903) 141 Cal. 291, 74 Pac. 853;

Goldberg v. Bruschi (1905) 146 Cal. 708, 81 Pac. 23;

Tiggeman v. Mrzlak (1909) 40 Mont. 19, 105 Pac.
 77.

All of these cases are founded on the annual labor provisions of R.S. 2324 as interpreted by Justice Field in the *Hammer* case, which the foregoing cases show to be the law of the United States. We are not talking solely of the general laws of Congress, but rather of the laws of the United States. It must be remembered that the 1938 Act restored to Alaska "The laws of the United States relat-

ing to mining claims, mineral locations and rights incident thereto * * *." Certainly the necessary construction and application of a congressional statute becomes an integral part of the "laws of the United States." The Supreme Court having construed and interpreted the statute that matter was then concluded.

"It is not now disputed that when any question, arising under the laws of the United States, has been once clearly and unequivocally adjudicated by the supreme court, it is no longer a proposition for judicial inquiry by the inferior national courts. No issue growing out of any statute, which has been once so adjudicated, can be said to involve in its determination the construction of such statute. It has been construed; there is nothing left to construe. All there is left is to follow the construction given" (*Inez Min. Co. v. Kinney* (D. Idaho 1891) 46 Fed. 832, 834).

It seems hardly possible, therefore, that this court should have intended the novel result that a controlling decision of the United States Supreme Court, interpreting a federal annual labor statute, is not part of the law of the United States relating to mining claims, mineral locations, and rights incident thereto.

R.S. 2324 imposed the obligation of annual labor as a condition of holding mining claims to avoid forfeiture. It does not declare that a senior locator must prove his labor or that a junior locator must prove the failure to perform the labor. In the *Hammer* case, the Supreme Court, therefore, had to determine under the statute where the burden of proof lay and it unequivocally held that the junior

locator asserting the forfeiture had the burden of proving it. There would be no necessity to decide the question of burden of proof in the absence of the statute, and the existence of the statute made it necessary for the court to interpret the statute and determine where that burden lay. *Hammer v. Garfield Min. Co.*, *supra*, therefore necessarily interpreted R.S. 2324 (*El Paso Brick Co. v. McKnight* (1913) 233 U.S. 250, 259-260).

In 1938 Congress could hardly have failed to realize that with a shifting and migratory population in Alaska and the steady dying off of old-time witnesses (Gustaf Soderblom, co-plaintiff in No. 5494, died at Ketchikan while returning to testify in this case, and his executor was substituted at time of trial, Tr. pp. 6, 64), an intolerable and nearly unsupportable burden would be imposed upon persons continuing to own or purchasing mining claims staked more than a few years ago by the retention of the burden of proof provisions of the Waskey Act. In repealing the forfeiture provisions, as this Court has held it did, Congress also necessarily repealed the Siamese "burden of proof" provision and reinstated in Alaska the laws of the United States.

We request that the rehearing be granted and that this court affirm the judgment of the district court that the 1938 Act repealed the burden of proof provisions of the Waskey Act as well as the forfeiture provisions. In the event that this court should not affirm that judgment, appellees should at least be given the opportunity to submit evidence of the performance of labor, which opportunity they did not have under the theory upon which the case

was tried by the district court and the parties that the burden of proof was on appellant (Tr. pp. 14-17, 23-25, 36, 39, 46, 58-59, 80, 88-90, 90-102).

Dated, San Francisco, California,
July 20, 1949.

SOUTHALL R. PFUND,
CHARLES J. CLASBY,
*Attorneys for Appellees
and Petitioners.*

PILLSBURY, MADISON & SUTRO,
ALLAN R. MOLTZEN,
Of Counsel.

CERTIFICATE OF COUNSEL

I hereby certify that I am one of the counsel for appellees and petitioners in the above-entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact, and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco, California,
July 20, 1949.

SOUTHALL R. PFUND,
Attorney for Appellees and Petitioners.

No. 11954

United States
Court of Appeals

for the Ninth Circuit

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States
for the Western District of Washington,
Northern Division

FILED

AUG 26 1948

No. 11954

United States
Court of Appeals
for the Ninth Circuit

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

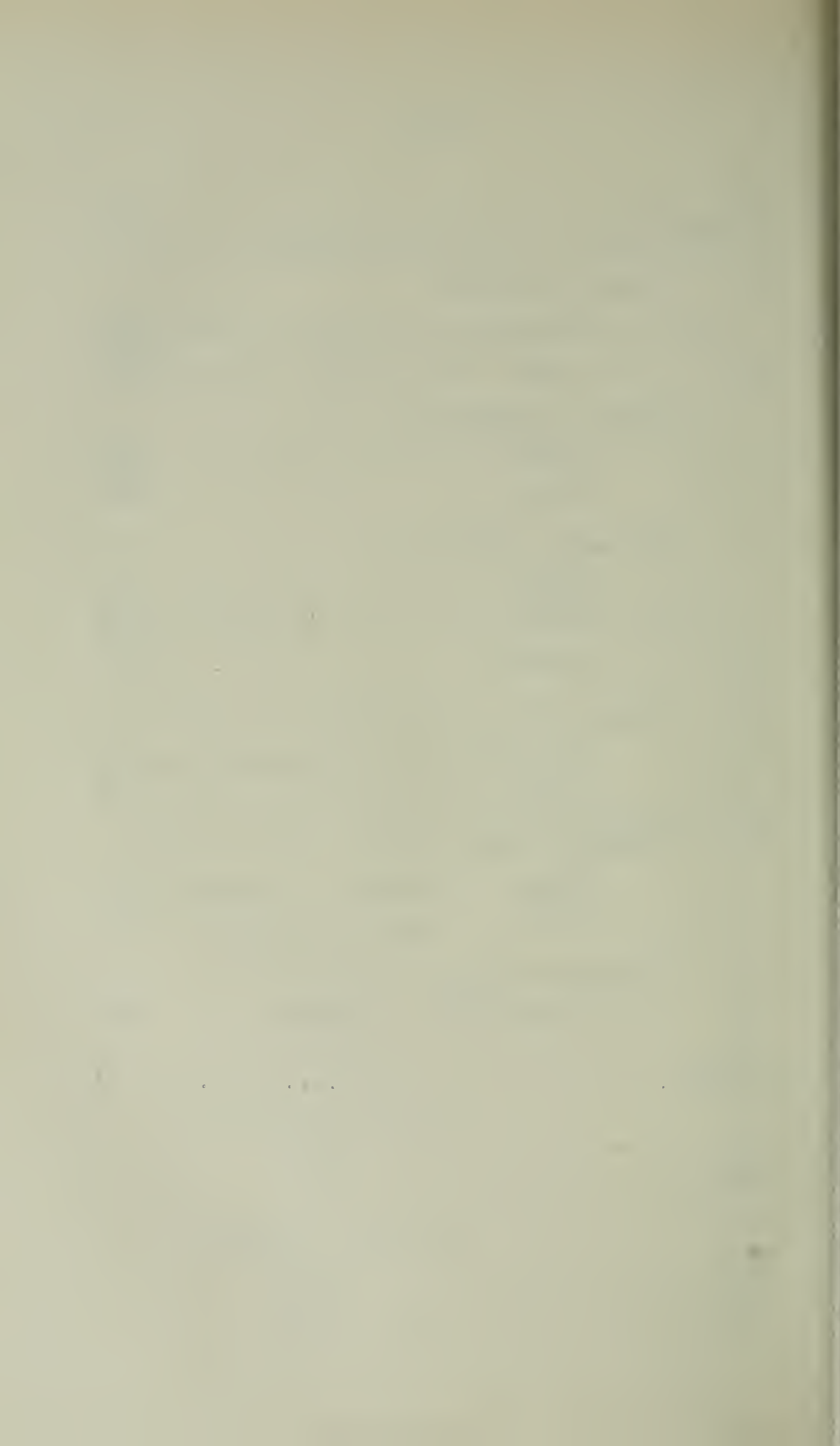
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NAMES AND ADDRESSES OF COUNSEL

DAILEY & CONROY,

Attorneys for Appellant,
Stokes Building,
Everett, Washington.

J. CHARLES DENNIS and
HARRY SAGER,

Attorneys for Appellee,
1017 United States Court House,
Seattle 4, Washington. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States District Court, Western District of
Washington, Northern Division

No. 47526

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT, RALPH R.

MACARTNEY, JR., and LEONARD A.

DOUGLAS,

Defendants.

INDICTMENT

The Grand Jury Charges:

COUNT I

On or about February 7, 1948, at Everett, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas, sold, bartered and exchanged to Joseph E. Goode the following narcotic drugs:

1 bottle containing 189 $\frac{1}{2}$ gr. morphine sulphate tablets

1 bottle containing 293 $\frac{1}{6}$ gr. morphine sulphate tablets

1 bottle containing 501 $\frac{1}{4}$ gr. morphine sulphate tablets

1 bottle containing 85 $\frac{1}{8}$ gr. morphine sulphate tablets

63 $\frac{1}{2}$ gr. morphine sulphate tablets

1 bottle containing 177 gr. powdered opium

1 bottle containing 51 $\frac{1}{4}$ gr. codeine sulphate tablets

- 1 bottle containing 100 $\frac{1}{4}$ gr. codeine phosphate tablets
- 1 bottle containing 100 $\frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing 502 $\frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing 40 copavin tablets
- 1 bottle containing 100 5-mg. dolophine tablets
- 1 bottle containing 39 copavin capsules
- 1 bottle containing 93 acetidine with codeine phosphate tablets

and said sale, barter, and exchange was not made pursuant to the written order of Joseph E. Goode upon a form issued for that purpose by the Secretary of the Treasury of the United States.

All in violation of 26 USC 2554(a) and 2557(b) (1).

COUNT II

On or about and during the period from January 6, 1948, to February 7, 1948, both dates included, at Everett, Washington, and other places in Snohomish County, Washington, and at Seattle, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and [2] Leonard A. Douglas, hereinafter called the defendants, conspired each with the other to commit an offense against the United States, to-wit, to violate the provisions of Section 2554(a) of Title 26, United States Code, in this, that said defendants conspired to sell, barter and exchange the narcotic drugs described in the first county of this Indictment to Joseph E. Goode, Harvey Neylon, and other persons to these grand jurors unknown, such

sale, barter and exchange not to be made pursuant to the written order of the person or persons to whom said narcotics were to be sold, bartered or exchanged upon a form issued for that purpose by the Secretary of the Treasury of the United States.

That after the formation of said conspiracy, and in order to effect the object thereof, the defendants committed certain overt acts as follows:

1. During the period from January 6, 1948, to January 16, 1948, at Everett, Washington, the defendants Leonard A. Douglas and Ralph R. Macartney Jr., had a conversation with each other.

2. On or about January 17, 1948, the defendant Garfield C. Barnett drove from Everett, Washington, to the home of the defendant Leonard A. Douglas at Snohomish, Washington.

3. On or about January 17, 1948, at Snohomish, Washington, the defendant Leonard A. Douglas delivered to the defendant Garfield C. Barnett a box containing the drugs described in Count I of this Indictment.

4. At some date between January 16, 1948, and February 7, 1948, the exact time being to the grand jurors unknown, at Everett, Washington, the defendants Garfield C. Barnett, and Ralph R. Macartney, Jr., held a conversation with Harvey Neylon.

5. On or about February 7, 1948, at Everett, Washington, the defendant Garfield C. Barnett gave to Harvey Neylon two bottles, each containing a narcotic drug.

6. On or about February 7, 1948, at Everett, Washington, [3] the defendant Garfield C. Barnett delivered to Joseph E. Goode a box containing the drugs described in the first count in this Indictment.

All in violation 18 USC 88.

A True Bill.

/s/ JOHN PAUL JONES,
Foreman.

/s/ J. CHARLES DENNIS,
United States Attorney.

/s/ HARRY SAGER,
Assistant United States Attorney.

[Endorsed]: Filed Mar. 10, 1948. [4]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Court Room No. 1.

Honorable John C. Bowen, presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT,
RALPH R. MACARTNEY, JR.,
LEONARD A. DOUGLAS,

Defendants.

ARRAIGNMENT AND PLEA

Now on this 9th day of April, 1948, J. Charles Dennis, United States Attorney, appearing for the

Government and Stanley L. Conroy, Attorney, appearing for the Defendant Garfield C. Barnett, this cause comes on before the Court for Arraignment and Plea of the Defendant Garfield C. Barnett who is present. The Defendant states at this time that his true name is Garfield C. Barnett and that he has received a copy of the Indictment. The reading of the indictment is waived. The Defendant enters a plea of not guilty to Counts I and II.

This cause also comes on before the Court for the Arraignment and Plea of the Defendant Ralph R. Macartney, Jr. The Defendant is present without counsel and in custody. The Court advises the Defendant of his right to have counsel. The Defendant states that he is without means. Whereupon the Court appoints Lew E. Flanders, an attorney to represent him and the Defendant accepts Mr. Flanders as his attorney.

Later: The Defendant is present with his counsel and states at this time that his true name is Ralph R. Macartney, Jr. The reading of the Indictment is waived and the Defendant enters a plea of not guilty to Counts I and II.

This cause also comes on before the Court for the Arraignment and Plea of the Defendant Leonard A. Douglas. The matter is called. The Defendant is not present. A Doctor's Certificate is filed. At the [5] request of Mr. Dennis, the cause as to this Defendant is continued subject to call.

The above cause is set for trial on May 11, 1948, at 10:00 a.m.

In the District Court of the United States for the
Western District of Washington, Northern
Division

Court Room No. 1.

Honorable John C. Bowen, presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LEONARD A. DOUGLAS,

Defendant.

SENTENCE PRONOUNCED
JUDGMENT SIGNED

Now on this 13th day of May, 1948, J. Charles Dennis, United States Attorney, appearing for the Government, this cause comes on before the Court for the imposition of judgment and sentence on Count II of the Indictment. The defendant Leonard A. Douglas is present in custody of the Deputy United States Marshal Schwerdfeld and he is represented by his counsel Kenneth A. MacDonald, who was appointed by the Court to assist the Defendant. The matter is called. James C. Wilcox, Probation Officer is present with the pre-sentence report. The further circumstances are related. A letter, dated May 13, 1948 from Dr. William Weinstein is filed.

It is the judgment of the Court, that the defendant is guilty to Count II of the Indictment, upon his plea of guilty thereto and he is convicted.

Sentence is pronounced.

Later: Written Judgment and Order of Probation as orally pronounced is signed in the presence of the Defendant and his counsel and he is remanded into the custody of the United States Marshal.

On oral motion of the Government, Count I is dismissed.

Journal No. 38. Page 505. [7]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Court Room No. 1.

Honorable John C. Bowen, presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

RALPH R. MACARTNEY, JR.,

Defendant.

SENTENCE PRONOUNCED
JUDGMENT SIGNED

Now on this 13th day of May, 1948, J. Charles Dennis, United States Attorney, appearing for the Government, this cause comes on before the Court for the imposition of judgment and sentence on Count II of the Indictment. The defendant Ralph R. Macartney, Jr., is present in custody of the Deputy United States Marshal Schwerdfield and he is represented by his counsel Lew E. Flanders, who

was appointed by the Court to assist the Defendant. The matter is called. James C. Wilcox, Probation Officer is present with the pre-sentence report and the further circumstances are related.

It is the judgment and sentence of the Court, that the defendant is guilty to Count II, upon his plea of guilty thereto and he is convicted.

Sentence is pronounced.

Later: Written Judgment, Sentence and Commitment is signed in the presence of the Defendant and his counsel. The defendant is remanded into the custody of the United States Marshal.

On the oral motion of the Government, Count I is dismissed.

Journal No. 38. Page No. 505 [8]

District Court of the United States,
Western District of Washington,
Northern Division

No. 47526

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT,

Defendant.

VERDICT

We, the Jury in the Above-Entitled Cause, Find the defendant Garfield C. Barnett is guilty as

charged in Count I of the Indictment; and further find the defendant Garfield C. Barnett is guilty as charged in Count II of the Indictment.

/s/ PERRY W. PURSELL,
Foreman.

[Endorsed]: Filed May 13, 1948. [9]

United States District Court, Western District of
Washington, Northern Division

No. 47526

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT,

RALPH R. MACARTNEY, JR., and

LEONARD A. DOUGLAS,

Defendant.

MOTION

Comes now the above named defendant, Garfield C. Barnett, and moves the Court for a judgment notwithstanding the verdict herein, or, in the alternative, for a new trial in the above entitled cause on the grounds and for the following reasons:

I.

Misconduct of the jury.

II.

Newly discovered evidence material for said defendant which he could not, with reasonable diligence, have discovered and produced at the trial.

III.

Accident and surprise which defendant could not have guarded against.

IV.

Error of law occurring at the trial and duly excepted to by the defendant.

V.

The court erred in its instructions to the jury given on its own motion.

VI.

The verdict is contrary to law and the evidence and denotes passion or prejudice.

DAILEY & CONROY,
Attorneys for Defendant Barnett.

[Endorsed]: Filed May 17, 1948. [10]

In the District Court of the United States for the
Western District of Washington, Northern
Division

Court Room No. 1.

Honorable John C. Bowen, presiding.

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT,

Defendant.

HEARING HAD—SENTENCE PRONOUNCED
JUDGMENT SIGNED

Now on this 24th day of May, 1948, J. Charles Dennis, United States Attorney, and Harry Sager,

Assistant United States District Attorney, appearing for the Government and A. E. Dailey, appearing for the Defendant Garfield C. Barnett, this cause comes on before the Court for hearing on Defendant's Motion for Judgment notwithstanding the verdict or in the Alternative, for a New Trial. The matter is called, argued and denied.

Journal No. 38. Page 538. [11]

United States District Court, Western District of
Washington, Northern Division

No. 47526

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT,

Defendant.

JUDGMENT, SENTENCE AND
COMMITMENT

On this 24th day of May, 1948, the attorney for the Government, and the defendant, appearing in person, the defendant being represented by A. E. Dailey and Stanley L. Conroy, his attorneys, the Court finds the following:

That prior to the entry of his plea, a copy of the Indictment was given to the defendant and that the defendant entered a plea of not guilty and a trial was held, resulting in a verdict of guilty as to Counts I and II thereof; that the Probation Officer

of this district has made a presentence investigation and report to the Court; now, therefore,

It Is Adjudged that the defendant has been convicted by jury verdict and is guilty and is convicted of the offense of violation of Section 88, Title 18, U.S.C., conspiracy to violation Sec. 2554a, Title 26, U.S.C., and violation of Section 2554a, Title 26, U.S.C., and violation of Section 2554a, Title 26, U.S.C., as charged in Counts I and II of the Indictment, and the Court having asked the defendant whether he has anything to say why judgment should not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court.

It Is Adjudged and Ordered that on Count I of the Indictment the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in the United States Penitentiary [12] at McNeil Island, Washington, or in such other like institution as the Attorney General or his authorized representative may by law designate, for the period of Three (3) Years and Nine (9) Months.

It Is Further Adjudged and Ordered that on Count II of the Indictment the defendant be committed to the custody of the Attorney General of the United States or his authorized representative for imprisonment in the United States Penitentiary at McNeil Island, Washington, or in such other like institution as the Attorney General of the United States or his authorized representative may by law designate, for the period of One (1) Day, the service of the sentence on Count II to be concurrent

with, and not consecutive to, the service of the sentence on Count I herein.

It Is Further Ordered that the Clerk of this Court deliver a certified copy of this Judgment, Sentence and Commitment to the United States Marshal or other qualified officer, and that said copy serve as the commitment of the defendant.

Done in Open Court this 24th day of May, 1948.

JOHN C. BOWEN,

United States District Judge.

Presented by:

HARRY SAGER,

Asst. United States Attorney.

Violation: (Narcotics).

[Endorsed]: Filed May 24, 1948. [13]

United States District Court, Western District of
Washington, Northern Division

No. 47526

UNITED STATES OF AMERICA,

Plaintiff,

vs.

GARFIELD C. BARNETT, et al.,

Defendants.

NOTICE OF APPEAL

To the above named plaintiff and its attorneys:

You Are Hereby Notified that the above named defendant, Garfield C. Barnett, elects to and does

hereby appeal from the judgment and sentence of the above entitled court, in the above entitled court, and from all proceedings therein had and done.

Dated this 24th day of May, 1948.

DAILEY & CONROY,
Attorneys for Defendant, Garfield C. Barnett.

[Endorsed]: Filed May 25, 1948. [14]

[Title of District Court and Cause.]

ORDER EXTENDING TIME

This matter having been presented before the Honorable John C. Bowen, judge of the above entitled court, and the United States District Attorney having approved the granting of an extension of time for the filing of the record on appeal herein,

It Is Now Ordered, Adjudged and Decreed that the above named defendant be and he is hereby granted twenty (20) days additional time in which to file the record on appeal.

Done in Open Court this 25th day of June, 1948.

/s/ JOHN C. BOWEN,
Judge.

Approved June 25, 1948.

/s/ J. CHAS. DENNIS,
U. S. Attorney.

[Endorsed]: Filed June 25, 1948. [19B]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

United States of America,
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered from 1 to 19, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above entitled cause as is required by designation of counsel filed and shown herein, as the same remain of record and on file in the Office of the Clerk of said District Court at Seattle, and that the same, together with the reporter's transcript of testimony and proceedings transmitted as a part hereof, constitute the record on appeal herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office by or on behalf of the appellant for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's fees: 8 pages at 40c, \$3.20; 12 pages at 10c, \$1.20; Notice of Appeal, \$5.00; total, \$9.40.

I hereby certify that the above amount has been paid to me by the attorney for the appellant.

In witness whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 25th day of June, 1948.

(Seal) MILLARD P. THOMAS,
Clerk.

By /s/ TRUMAN EGGER,
Chief Deputy Clerk.

[Title of Court and Cause.]

Before The Honorable John C. Bowen, District Judge.

TRANSCRIPT OF PROCEEDINGS AT TRIAL

Appearances: J. Charles Dennis, United States Attorney, and Harry Sager, Assistant United States Attorney, appearing for and on behalf of the plaintiff. [1*] A. E. Dailey and Stanley L. Conroy (Messrs. Daily and Conroy) appearing for and on behalf of defendant, Garfield C. Barnett. [2]

Seattle, Washington, May 11, 1948
2:00 o'clock, p.m.

RALPH R. MACARTNEY, JR.,
called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name [3]

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

(Testimony of Ralph R. Macartney, Jr.)

A. Ralph R. Macartney, Jr.

Q. Mr. Macartney, are you named as one of the defendants in this case? A. I am.

Q. Do you know Mr. Garfield C. Barnett?

A. I do.

Q. When did you become acquainted with him?

A. I became acquainted with him when I came to Everett, Washington.

Q. About when was that?

A. Oh, approximately December,—about the 20th of December, I would say.

Q. Of last year? A. Yes, sir.

Q. What was the occasion of your becoming acquainted with Mr. Barnett?

A. Well, to retain him to represent me in this grand larceny case with which I was charged.

Q. Where were you at that time?

A. In the Snohomish County Jail.

Q. Did he represent you in that matter?

A. Well, up to a certain point.

Q. Was he your attorney for part of the time?

A. He was.

Q. Do you know Leonard A. Douglas? [4]

A. I do.

Q. Where did you become acquainted with him?

A. In the Snohomish County Jail.

Q. About when?

A. Oh, let me think. Oh, in January.

Q. Of this year? A. Yes.

Q. He was an inmate of the jail there at that time, too, was he? A. Yes, he was.

(Testimony of Ralph R. Macartney, Jr.)

Q. Mr. Macartney, did you have a conversation with Mr. Douglas while the two of you were in jail there concerning narcotic drugs? A. We did.

Q. Will you tell us what that conversation was?

Mr. Dailey: I object, if Your Honor please, unless the defendant was present at the time.

The Court: Is there any response to the objection?

Mr. Sager: The charge here is one of conspiracy, Your Honor. I will state to the Court that evidence will connect Barnett with this conspiracy. This conversation is a part of the conspiracy.

Mr. Dailey: If Your Honor please, the defendant on trial has two charges against him. It [5] seems to me that only his part, if any, covered by either one or the other of the charges could possibly be material.

Any conversation between two people who are not joint defendants here at the present time could not be properly heard.

The Court: Do you make that objection to one or both of the defendants?

Mr. Dailey: Both, Your Honor.

The Court: The court is of the opinion, subject to the statement by counsel offering the evidence, that it is admissible under Count 2. At some time during the progress of the trial and not later than the court instructs the jury finally as to the law covering the case, the court intends to give a cautionary instruction in the usual form as to this matter and as to this point. At any time before

(Testimony of Ralph R. Macartney, Jr.)

that, if counsel request the court to do so in proper form, the court will give that cautionary instruction in connection with this point. Subject to that condition, this objection is overruled so far as the allegations of Count 2 are concerned.

In that connection, the jury is now advised that you are not to consider this question and the answer thereto, and any line of testimony of this [6] nature as any evidence against the defendant on trial respecting the allegations in Count 1. It is received in evidence subject to the allegations in Count 2, subject to a cautionary instruction to be later given by the court.

Any time that counsel wish to request that cautionary instruction, I will be glad to consider it.

If the form is appropriate, I will say to counsel now that I will give such a cautionary instruction.

Mr. Dailey: Exception, if Your Honor please.

The Court: Allowed.

Q. (By Mr. Sager): What was that first conversation in jail with Douglas concerning narcotics?

A. Douglas came over to my cell, which was across from his, and said that he had found a package containing a lot of narcotics and wanted to know whether I knew whether or not he could sell them and what they were worth. I told him I knew a user who lived in the Ritz Hotel in Seattle to whom he could probably sell them. That was the first conversation.

Q. Did you tell him who the user was?

A. Yes. [7]

(Testimony of Ralph R. Macartney, Jr.)

Q. Who was it?

A. I told him his name was Harvey. I don't know whether I told him his last name or not, but I know his last name was Naylon.

Q. Do you know how to spell that?

A. No, I don't.

Q. Did you tell him what experience you had had with Naylon so that you knew he was a user?

Mr. Dailey: That is objected to as being leading, if Your Honor please.

The Court: Objection sustained.

Q. (By Mr. Sager): Did you tell him anything further than the name was Naylon?

A. Yes.

Q. What was that?

A. I told him that I had seen him—not using it—but all “goofed up” around there and understood that he was a user, and that I was out at one time with a nurse who I found out was a user and had a lot of narcotics, and I had her put out of the hotel. I told him about that fact and he tried to get me at that time to find that nurse again and give the narcotics to him.

Mr. Dailey: If Your Honor please, I object [8] to what someone tried to do or tried to get him to do as calling for a conclusion of the witness and not responsive to the question.

The Court: That objection is sustained, unless he is telling what he said or what the other person said. The objection is sustained.

Q. (By Mr. Sager): Just the conversation be-

(Testimony of Ralph R. Macartney, Jr.)

tween you and Douglas is what I want, Mr. Macartney.

A. He said, "What do you think it is worth?" and he said it was worth, he thought, \$10. Douglas showed me this magazine and said, "That is what it is worth, also."

Q. \$10 for how much?

A. For an ounce,—for a grain, I believe.

Q. Did Douglas say anything about how much he had?

A. If I remember, he said he had about 1,000 grains.

Q. Did he say where he had them?

A. Yes. He said he found them and that they were buried underneath a house on the North Bend Road.

Q. Was there any further conversation between you at that time as to how he might dispose of them?

A. No; with the exception of the fact that I told him the only place I thought we could dispose of them would be to Naylor. [9]

Q. Was anything said as to how he could contact Naylor? A. Not at that time.

Q. Did you have any further conversation with Douglas? A. Yes.

Q. Was that at the same place,—in jail?

A. In the local jail.

Q. What was that conversation?

A. That was the conversation that I would tell my attorney about it.

(Testimony of Ralph R. Macartney, Jr.)

Q. You are speaking about the conversation between you and Douglas?

A. Between Douglas and myself.

Q. What was that conversation?

A. The extent of it was that I told Douglas that I would see my attorney about it and tell him that you said you had all of these drugs and so forth; and that "you had found them out here," and tell my attorney about it and he could get in touch with Naylor.

Q. Did you tell him who your attorney was?

A. Yes; he knew.

Q. Who did you say it was?

A. I said it was Barnett.

Q. Did you have any later—

The Court: Just a moment. There is no identification of Barnett. [10]

Q. (By Mr. Sager): Is that the defendant here? A. Garfield Barnett, yes.

Q. He was acting as your attorney at that time?

A. He was.

Q. Did you have any further conversations with Douglas concerning this matter?

A. Well, yes, we did.

Q. When was that?

A. Oh, a few days later, I would assume. I don't remember the dates.

Q. What was that conversation?

A. Well, we were talking in there and Douglas was going out,—going out of the jail. He said that he would deliver those drugs to Barnett in the box

(Testimony of Ralph R. Macartney, Jr.)
in which he said that they were placed,—which he didn't do.

Q. Did you at any time talk to Mr. Barnett about these drugs? A. I did.

Q. What was your conversation on the first occasion with Mr. Barnett?

A. Well, I told him that Douglas said that he had found these drugs, and he told me they were contained in a shoe box—I believe it was a shoe box,—and that he would bring them in and deliver them to Barnett, [11] but I wasn't positive, of course, if he had the drugs. I didn't know whether he had them or didn't have them at that time, and I hadn't seen them. He said he would take them in and deliver them to Barnett at his house and then Barnett could get in touch with Naylor.

Q. Did you tell him his name?

A. Yes: I don't remember whether I told him his whole name or I told him his first name. I told him his name was Harvey and that he lived in the Ritz Hotel and described him to him.

Q. Did you tell him what you knew about Naylor? A. I told him.

Q. What did he say?

A. Well, he said he would see what he could do.

Q. Did that conversation that you have just related with Mr. Barnett,—when did that occur as nearly as you can state, with respect to the time when Douglas was released from jail?

A. Well, I would say approximately,—I don't

(Testimony of Ralph R. Macartney, Jr.)

know exactly, but I would say two or three days, maybe, before—if I am not mistaken.

Q. Do you know when Douglas was released from jail? A. No, I don't remember the date.

Q. After he was released from jail, did you again see [12] him?

A. The only time I saw him was in the kitchen downstairs, and he was down there for a meal. I didn't have any conversation.

Q. Did you see Mr. Barnett, following Douglas' release? A. I did.

Q. Did you have a conversation with him concerning Douglas or these drugs?

A. I believe—I may be mistaken—but I think this is correct. I believe the conversation I had with him was first about Douglas; and the next conversation was about the drugs.

Q. What was the conversation about the drugs?

A. I believe that the first time I saw him, that he said Douglas hadn't delivered the drugs.

Q. Had not?

A. Had not delivered the package, that is right.

Q. I didn't get that.

A. That Douglas had not delivered the package as Douglas said he was going to do. And the second time that I saw him—I think I am right about this—the second time I saw him was when he was put under arrest and came in to the County Jail.

Q. Do you recall Barnett? A. Yes. [13]

Q. Had you had any conversation with him prior to that time— A. Oh, yes.

(Testimony of Ralph R. Macartney, Jr.)

Q. —concerning the drugs or concerning Nalon?

A. Yes, we had.

Q. Will you tell what that conversation or conversations was.

A. He advised me that he had talked to Naylor. I believe he went to Seattle and talked to Naylor, or didn't find him. Then he came back to Everett. Naylor came over to Everett one day, and he came in the jail there with Barnett. At that time—we were in a visiting room there—and at that time Naylor said, "How do I know that you have got any?" First he said, "Is this man all right?" and I said, "Yes."

Q. Who said that? A. Naylor.

Q. Who did he refer to? A. Barnett.

Q. Was Barnett there at that time?

A. Barnett was sitting right there.

Q. Go ahead. What was the rest of that conversation?

A. Then he said, "How do I know you have got them?" I said, "Barnett says he has got them." He said, [14] "How do I know?" and I said to Barnett, "Give him two or three of the bills and prove it to him or let him see them." And he said he would. So then he talked about price. Naylor said, "Well, they are worth about \$4."

Q. For how much?

A. A grain; \$4 a grain. I said, "Well, they are worth more money than that." I said, "You told me \$10 when you tried to get me to get ahold of some one time." And I said, "This magazine said

(Testimony of Ralph R. Macartney, Jr.)

\$10." And he said, "It is only \$4 on one sale." He said, "There has to be a 3-way cut with me." He said, "I want the morphine for my share, my part of it." He said, "I don't want the money."

"Well," I said, "see, what you can do."

Well, then, the next conversation I had with Barnett, Douglas had called me and said he had a Chinaman that he had done business with for some time. This is what Barnett told me. But the next time I saw Barnett, nothing had happened.

The next time I talked to Barnett was when he was in there and I said to him, "Well, I don't think he is going to do anything about it,"—that I would be afraid of the man—that you had better forget him." And that was Naylor. I don't [15] know if these are in sequence or not but those are the conversations that we had.

Then, when I saw him that night, I came out from the kitchen and the Deputy there at the desk said, "Your attorney was here and went upstairs to be fingerprinted."

Q. Before that, Mr. McCartney, did you at one time have a conversation with Barnett in which he said he had received the drugs from Douglas?

A. Yes. He said he had received them.

Q. What else did he say at that time concerning that?

A. Well, he told me,—I told him that Douglas had insisted to me that he had found the drugs. He said at that time that he thought Douglas possibly had stolen them because there were no signs

(Testimony of Ralph R. Macartney, Jr.)

on the box that they had been buried, such as Douglas advised me.

Q. Will you state whether he had examined the contents of the box?

A. Yes. He had a little list there of everything that was in them.

Q. Did he describe to you the containers in the box?

A. No, he didn't describe the containers in the box. He just had a little list of what was in them.

Q. Did he say anything about the containers at all? [16]

A. No, I don't remember him saying anything about the containers. He had a list of what was in there,—an eighth of a grain of this and a quarter grain of that, a half grain of this, and so many ounces of that, on a little slip of paper.

You saw him the night he was arrested?

A. Yes.

Q. I am speaking of Barnett? A. Yes.

Q. Had you had a conversation with him that same day prior to his being brought to the jail?

A. I don't remember whether I had that day or not. That night he was arrested?

Q. That is right.

A. Yes; I think that was the day. He said that a man would be over. I am not positive about that day but I think I am correct. He said that a man would be over that would buy them, that night. I am pretty sure,—that may not have been the day, but I think it was.

(Testimony of Ralph R. Macartney, Jr.)

Q. Did he say who advised him of that?

A. Naylon.

Q. Did you talk to him after he was brought to the jail that night? A. I did. [17]

Q. What conversation did you have with him at that time?

A. Well, when he came upstairs from down in the kitchen, the Deputy at the desk said "Your attorney is upstairs being fingerprinted."

I didn't know what for. I had no idea right then. I thought he was kidding me. Then he came back downstairs, and I think he had a come out from in at the other room. I called to him—

Q. Who are you talking about?

A. Barnett. I called to him and asked him what he was there for and he said he was under arrest for narcotics. I asked him, "What shall I do?" and he said, "Just tell them the truth." So then I went into the far room with the two narcotics agents.

Q. During any of these conversations with Mr. Barnett, was there any discussion as to what would be done with the proceeds of the sale of the drugs?

A. Yes, there was.

Q. What was that conversation?

A. The essence of the conversation was—

Mr. Dailey: I object to that, if Your Honor please. That calls for a conclusion. The essence of the conversation means only his conclusion in regard to it. [18]

(Testimony of Ralph R. Macartney, Jr.)

The Court: You ought to first exhaust his recollection as to what was said.

Q. (By Mr. Sager): Tell us, the best that you can recall, what you said and what Mr. Barnett said concerning that matter?

A. Well, the split would have been a third, a third, and a third.

Q. To whom?

A. A third to Douglas and a third to Barnett and a third to me. Douglas and I decided that that would be equitable.

Q. You mean previously?

A. Yes. Then Barnett said, "Well, my attorney's fees for the trial will come out of it."

Q. For what trial was that?

A. The Grand Larceny trial.

Q. The charge that you were then being held on?

A. If it went to trial.

The Court: Some of your statements do not appear to be answered. I don't know whether the record shows them to be questions or just statements. You should not make statements. You should ask questions and then, if you wish them answered, the court will have the witness answer them if he can. [19]

Q. (By Mr. Sager): You stated that you and Douglas had agreed that that division would be accurate, is that correct? A. That is right.

Q. When had you agreed to that, you and Douglas?

(Testimony of Ralph R. Macartney, Jr.)

A. Well, previous to the time that Douglas left the jail, if Barnett agreed to take the drugs.

Q. Was Douglas ever present when you and Barnett discussed this matter? A. No.

Q. So this conversation you have related as to division of the proceeds was between you and Barnett, is that correct? A. Yes, that is correct.

Q. Mr. McCartney, on the occasion when Mr. Barnett told you that somebody was coming out that night to buy these drugs, do you recall whether or not he said anything about whether the price had been agreed on or anything of that nature?

A. Yes, I think he said he was going to get \$6,000.

Q. Now, following the conversation you had with Mr. Barnett the night he was arrested and brought to the jail there, did you have any subsequent conversation with him concerning these narcotics? A. Yes, we did. [20]

Q. When was that?

A. Well, I think that was about three days later, Your Honor.

Q. After his arrest? A. Yes.

Q. Where did that conversation occur?

A. In the visiting quarters, there.

Q. At the jail? A. Yes.

Q. What was said on that occasion?

A. Well, Barnett was in a dither, naturally, and so was I. I said to him at the time, "Well, I got you into this." He said, "Well, I don't know whether I can have the funds to defend myself and

(Testimony of Ralph R. Macartney, Jr.)

so forth." I said, "Well, you might try my father." Then I got to talking to him and I said, "What are you going to use for a defense?"

Mr. Dailey: Will you speak a little louder, Mr. Macartney? I have trouble hearing you.

A. (Continuing) I said, "What are you going to use for a defense?" And he said, "Well, I don't know. I think I will suggest that I thought you were in a dope ring or something." I said, "That is enough for me. I don't want any of that." I said, "You are on your own and I will go on my own." To [21] my recollection, that is the last conversation I had with him.

Q. Did you say anything to him at that time with reference to the conversation you had with him the night of the arrest?

A. I told him that I had told him the truth in that room. I told him different stories later. But I gave him a song and dance in the sheriff's office one day. I told him I would take the blame for the whole thing. But apparently I was going to take the blame for the whole situation, and my reputation had been impaired enough with this grand larceny thing, without taking the narcotics thing also, so I just washed my hands of it.

Q. Mr. Macartney, what happened to your grand larceny charge up there?

A. I went to court and had the court appoint me an attorney and pled guilty.

Q. What was the result of that?

(Testimony of Ralph R. Macartney, Jr.)

A. I was sentenced to fifteen years in the Washington State Penitentiary.

Q. Is that where you are now?

A. That is where I am now.

Q. You were brought here under the custody of the Marshal? A. That is right, yes. [22]

Q. And you have entered a plea of guilty to the conspiracy count in this charge here?

A. I entered a plea of guilty because technically I was guilty. I never saw the drugs and still haven't. I was guilty under the law on the second count and pled guilty.

Mr. Dailey: If the court please, I object. I think the witness should confine his answer to the question.

The Court: The question was what your plea was or something to that effect.

Mr. Sager: You may inquire.

Cross Examination

By Mr. Dailey:

Q. You were first arrested on what date in December, in Snohomish County?

A. I don't remember.

Q. But it was sometime around Christmastime or shortly before that, was it not?

A. I believe it was December 20th, if I am not mistaken.

Q. You were arrested then on two charges of grand larceny?

A. Yes. One charge and two counts.

Q. You got in touch with Mr. Barnett as your

(Testimony of Ralph R. Macartney, Jr.)

attorney, [23] did you not? A. I did.

Q. And you had him get in touch with your father? A. I did.

Q. Where does your father live?

Q. Klamath Falls, Oregon.

Q. You got in touch with regard to his getting in touch with your father for some fees or for yourself and to help you? A. So far as I know.

Q. Did you authorize him to get in touch with your father to get back this something like \$5,000 that you were charged with taking?

A. Did I authorize him to?

Q. Yes.

A. I wrote my father and asked him.

Q. You wrote your father and asked him if he would send you \$5,000?

A. I also asked Barnett to ask him.

Q. Barnett showed you a letter that he got from your father, didn't he? A. He did.

Q. Your father refused to give you \$5,000 to pay back what you were accused of stealing?

A. That is right. [24]

Q. But did he send Mr. Barnett \$250 on account as your attorney, didn't he? A. That is right.

Q. And it was understood between Mr. Barnett and your father that your father would pay him his attorney's fees, is that right?

A. It was understood between my father and myself.

Q. What?

A. Between my father and myself.

(Testimony of Ralph R. Macartney, Jr.)

Q. Didn't he show you a letter written by your father to him wherein he said he was enclosing \$250 on account of attorney's fees?

A. He also wrote me and said that he would see that I had legal representation.

Q. Your case had not yet been set for trial?

A. No. As a matter of fact, I hadn't pled.

Q. You hadn't pled. There was to be a jury term in January—that is, the next month—is that right?

A. I am not familiar with that.

Q. You don't know that. Now, how long had you been in the County Jail when you met Douglas?

A. I should say three weeks, I would imagine.

Q. You had been in there three weeks?

A. I would imagine that.

Q. That then, would be along toward the middle of [25] January when you first met Douglas?

A. Well, about that I would say.

Q. And he was in jail there in the County Jail under that charge, is that right?

A. He was.

Q. Do you know what he was charged with?

A. No. I believe he was charged with robbery.

Q. Either robbery or burglary?

A. Yes.

Q. He was ill at the time, wasn't he?

A. Yes.

Q. When was it that he left the county jail?

A. I don't remember the date he left. He left when he was sentenced.

Q. When was it that he told you that he had found these narcotics?

A. Oh, about—well, not long before he left—not

(Testimony of Ralph R. Macartney, Jr.)

too long before. I would say maybe two weeks or ten days afterwards. I don't remember exactly.

Q. And you had talked with him, had you, about you being able to sell it? A. No.

Q. Why would he suggest it to you, then, do you know? A. No.

Q. But he just, without being any better acquainted with [26] you than having met you there, suggested that you dispose of it for him, is that right? A. No.

Q. What did he suggest?

A. He asked me if I knew where he could sell them.

Q. What did you tell him?

A. I tol him about this man Naylon.

Q. You told him about Naylon? A. Yes.

Q. What other conversation did you have with him; did he tell you to go ahead and get in touch with Naylon?

A. No. He just said, "See what you can do."

Q. Then how long after that was it that you suggested that he see Mr. Naylon?

A. I was not convinced at the time that he had any drugs.

Q. You weren't convinced of it? A. No.

Q. But you asked Mr. Barnett, from time to time, if Douglas had left a package with him for you, didn't you?

A. I asked Mr. Barnett if Douglas had left a package with him for me?

Q. Yes. A. No, I think not.

(Testimony of Ralph R. Macartney, Jr.)

Q. Didn't he tell you that Douglas had left a package [27] with him?

A. No. Not until the night—until about three nights after Douglas had left there. Then he came down to the jail, and he then told me that he had gone out to Douglas' house and picked up a package.

Q. Didn't you ask him if he had?

A. Did I ask him?

Q. Yes. A. No.

Q. Didn't you ask him if Douglas had left a package? A. No, I did not.

Q. All right. He came to the jail and told you that he had been out to Douglas' house and picked up a package? A. That is right.

Q. Then you suggested to Barnett that he get in touch with Nylon?

A. At that time—well, I had told him about that before.

Q. You had told him about Nylon before?

A. Yes.

Q. Why would you tell him about Nylon if you didn't believe that a package existed?

A. Because, in case the package did exist and contained the drugs. [28]

Q. You had told him how long before—when was the first time you told him, in other words, to get in touch with Nylon?

A. I don't remember exactly.

Q. You told him, as a matter of fact, that Nylon owed you money, did you not?

(Testimony of Ralph R. Macartney, Jr.)

A. I did not.

Q. And you told him that Naylon ought to be willing to help you? A. Absolutely not.

Q. But he did get in touch with Naylon and brought him up to the County Jail to see you, didn't he?

A. He brought Naylon up to the County Jail, yes.

Q. And you and Naylon talked together?

A. And Barnett.

Q. Barnett was on the other side of the room, was he not? A. He was not.

Q. Did he take any part in the conversation?

A. He did.

Q. What part did he take in it?

A. Barnett was standing to the right. Naylon was next to me and the conversation took place that I just told you about a minute ago. Naylon said to me, "Is Barnett all right?" and I said, "Yes." And then we discussed the price. [29]

Q. Then you and Naylon discussed price?

A. And Barnett was there.

Q. Barnett didn't say anything about price, did he? A. I don't remember.

Q. Was it your understanding then, that you had any right to any part of this?

A. Was it my understanding that I had any right to——?

Q. Yes. A. No.

Q. It was not your understanding that you owned any part of it?

(Testimony of Ralph R. Macartney, Jr.)

A. I beg your pardon?

Q. It was not your understanding that you owned any part of these drugs?

A. No, I didn't own any part of the drugs.

Q. It was not your understanding that you were going to own any part of them?

A. Not of the drugs, no.

Q. How did it happen, then, that you should be cut in one-third?

A. Why should I be cut in one-third?

Q. Yes.

A. Because I was the only person that knew Naylor.

Q. I see. But Naylor was to have a third?

A. Not to my knowledge. [30]

Q. I thought you said Naylor was going to take his third out in stuff?

A. Not from us—whoever he sold it to.

Q. You discussed that, and he was to collect from whoever he sold it to?

A. That is right. And Barnett took part in that conversation and discussion and was there.

Q. Douglas was to have a third? A. Yes.

Q. And you were to have a third? A. Yes.

Q. Why were you to have a third if you had no interest in it, do you know?

A. I beg your pardon?

Q. Were you acting, then, as salesman and to get your third as a commission or a profit or something of that kind? A. No.

(Testimony of Ralph R. Macartney, Jr.)

Q. Someone was just cutting you in?

A. I would have gotten attorney's fees in case of a trial and that would have been my extent.

Q. Of course, you knew that your father was paying him his attorney's fees, didn't you?

A. I had no idea that my father was going to any expense for trial. [31]

Q. You were trying very hard, after your father refused you, to raise \$5,000 to pay back Mr. Richmond, weren't you? A. No.

Q. You weren't intending to pay it back?

A. It was impossible at that time.

Q. What?

A. It was impossible at that time.

Q. You didn't want to pay it back?

A. I had the desire to pay it back.

Q. As a matter of fact, you wrote him a letter offering to pay it back in installments of \$400 a month, didn't you? A. That is right.

Q. Where were you going to get the \$400 a month? A. By working.

Q. How much money did you earn in '47, Mr. Macartney? A. In when?

Q. '47?

A. In '47? Let me see, I don't remember correctly, but I would say about—I would say approximately with everything about \$11,000.

Q. That is not counting the ten that you got from Mr. Richmond? A. What ten? [32]

Q. Well, approximately ten—or \$5,000, rather,

(Testimony of Ralph R. Macartney, Jr.)

that you got from Mr. Richmond. A. No.

Q. That wasn't counting that?

A. No. This was a security business. I worked for Schwellen & Wilcox—managed an office for them.

Q. Now, you told Mr. Barnett to give Mr. Naylor some of the narcotics that he had, did you not?

A. That is right.

Q. What for?

A. For the same reason I mentioned a minute ago.

Q. What reason?

A. Mr. Naylor wanted to know whether Mr. Barnett had the narcotics or not.

Q. He wasn't sure whether he had them?

A. That is right.

Q. Why would Naylor come up to talk to you about it?

A. Because of the fact I lived in the same hotel he lived in.

Q. He was a friend of yours in other words?

A. I wouldn't say he was a friend of mine. He was an acquaintance.

Q. Well, you had been around together some, hadn't you? A. Never.

Q. You sent Barnett to him, didn't you? [33]

A. Yes.

Q. You told him Barnett wanted to see him, didn't you?

(Testimony of Ralph R. Macartney, Jr.)

A. No. I didn't. I thought it would be better if Naylon came and saw me.

Q. And you never had seen Douglas before you met him there in the County Jail?

A. No, I hadn't seen him.

Q. Do you remember talking with me when I came to the County Jail with your brother after Mr. Barnett was arrested?

A. I remember having a conversation with you.

Q. Did you tell your brother and I that Barnett had nothing to do with this at all and that it was a shame that he was in trouble?

A. No, I didn't tell him that.

Q. What did you say?

A. I told him and my brother at the time that I thought Barnett was the victim of an unfortunate circumstance in being connected with it, and my feelings haven't changed.

Q. Then the next day or a day or two afterwards, you went over and pled guilty to one of the counts of grand larceny? A. That is correct.

Q. And you are now confined in the penitentiary. Have [34] you ever been confined in the penitentiary before? A. No, I have not.

Q. Were you at one time committed to the Veterans' Hospital in Oregon? A. I was.

Q. When was that? A. In 1947, I believe.

Q. You were first committed August 14th, 1946, were you not? A. '46 is right, yes.

Q. And you were found to be——

(Testimony of Ralph R. Macartney, Jr.)

A. Incompetent.

Q. You were found mentally incompetent?

A. That is correct.

Q. How long were you confined in Oregon?

A. I think I stayed there about three months.

Q. Then you were allowed to go home on a visit, weren't you? A. No.

Q. What happened then? A. No. I left.

Q. What happened then; how did you get away from there? A. I walked away.

Q. You never were discharged?

A. That is correct. [35]

Q. You never have yet been discharged from that place? A. That is correct.

Q. You don't receive any compensation or pension from your service?

A. No. I have a claim number in.

Q. Are you a married man? A. I am not.

Q. I beg your pardon? A. I am not.

Q. Recently divorced?

A. That is correct.

Q. Do you have a family? A. I do.

Q. How much of a family?

A. Two children.

Q. You have two former wives and four children, don't you? A. I do not.

Q. Weren't you married before?

A. I was.

Q. No children?

A. I had one child by my first wife.

(Testimony of Ralph R. Macartney, Jr.)

Q. Counsel asked you about it and you said that you were in here, I believe, yesterday, and pled guilty to the second count in this Information?

A. That is correct.

Q. Have you been sentenced on that?

A. I have not.

Q. Have you been promised anything in the way of mitigation of sentence because of your plea of guilty?

A. I have not.

Q. Have you been promised anything in the way of mitigation of your sentence for appearing and testifying as a witness in this trial?

A. I have not.

Q. Have you talked with anyone about it?

A. I talked to the attorney about it.

Q. You have talked to the District Attorney about it?

A. Yes.

Q. Has he made any promises to you?

A. None whatsoever.

Q. None whatsoever?

A. That is correct.

Q. Has he told you what he would do or attempt to do in your behalf?

A. He has not told me a thing. That is the first statement that I have given concerning this case was yesterday.

Q. What?

A. The first statement that I have given to him concerning [37] this case was yesterday.

Q. Was yesterday?

A. That is correct.

Q. As a matter of fact, you have talked with

(Testimony of Ralph R. Macartney, Jr.)

him quite a little while ago when you were brought over here to enter your plea, didn't you?

A. I did not.

Q. Well, at any rate you pled guilty to the second count in this indictment, and the first one was dismissed, is that right?

A. I pled guilty to the second count of the indictment, and the first count, as I understood the judge to say, was postponed.

Q. What? A. Was postponed.

Q. It is understood that it has to be dismissed, is it not?

A. I have no understanding whatsoever.

Q. No one told you that?

A. No one told me it was dismissed. I just heard what the judge said.

Mr. Dailey: I think that is all. [38]

Redirect Examination

By Mr. Sager:

Q. You were represented by an attorney in your appearance in this court? A. I was.

Mr. Sager: That is all.

The Court: You may be excused from the witness chair.

(Witness excused.) [39]

HARVEY NAYLON

called as a witness on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

(Testimony of Harvey Naylon.)

Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. Harvey Naylon.

Q. Mr. Naylon, where do you live?

A. 2611½ Fourth Avenue.

Q. Is that the Ritz Hotel?

A. No, it is not.

Q. Have you lived at the Ritz Hotel?

A. Yes, sir.

Q. Here in Seattle? A. Yes, I have.

Q. When were you there?

A. Oh, I moved out about three months ago, something like that.

Q. How long had you lived there prior to that time?

A. Oh, close to three years—two and a half or three years.

Q. Do you know Ralph R. Macartney?

A. I have met him. [40]

Q. Where did you meet him?

A. At the Ritz Hotel.

Q. About when?

A. Oh, some time I believe in January; somewhere around about that time—the first of January.

Q. Mr. Naylon, are you addicted to narcotics?

A. Yes, sir.

Q. How long have you been addicted to nar-

(Testimony of Harvey Naylor.)

cotics? A. About twenty years.

Q. Have you met Mr. Garfield Barnett?

A. Yes, sir.

Q. Do you see him in the court room now?

A. Yes, sir.

Q. Will you point out where he is?

A. He is sitting over there by the second man over there—the man with the glasses.

Q. At the table? A. Yes, sir.

Q. Where did you first meet him?

A. At the Ritz Hotel.

Q. About when?

A. Some time in January—perhaps the first week in January or the middle, something like that.

Q. What was the occasion of your seeing him there at that time? [41]

A. Well, he wanted to see me about buying some narcotics.

Q. Did you talk to him at the hotel on that occasion?

A. A short conversation in regard to it, yes, sir.

Q. Will you speak a little louder, Mr. Naylor?

A. Yes, sir; we did.

Q. Just tell us, if you recall, what that conversation was. A. Well——

The Court: What he said and what you said, relating the conversation as nearly as you can recall it.

A. Well, he said that a friend of his or a client of his and himself had some narcotics that were

(Testimony of Harvey Naylor.)

available to them to the extent of somewhere around one thousand grains, I believe it was, and that they wanted \$10,000 for it, and would I know of anybody that wanted them or could I use them myself. So I told him I would see as to what could be done about it and we made a previous appointment which was perhaps a week or a little after that, that I met him again.

Q. Before you get away from that first conversation, did he say who his client was?

A. This was Mr. Macartney (McCarthy).

Q. Did you know him?

A. I had met him a short time before I met Mr. Barnett. [42]

Q. Did Mr. Barnett say anything to you about your acquaintance with his client?

A. Yes. Apparently, Mr. McCarthy had given him my name, so that is how they come to look me up.

Q. Did he know your name when he came to the hotel? A. Yes. He asked for me.

Q. Did he introduce himself?

A. Yes, he did.

Q. How did he introduce himself to you?

A. He told me his name was Mr. Barnett, and he was an attorney from Everett. We continued on then about the narcotics.

Q. Did he tell you anything more about these narcotics than what you have already stated?

(Testimony of Harvey Naylon.)

A. At the time he didn't tell me too much about them, no.

Q. Did he tell you what they were?

A. Not too much at the time. He just gave me the idea that he had some if I was interested and we made this previous appointment.

Q. Did you make a definite appointment to see him later?

A. Well, I think it was either on the following Tuesday or——

The Court: I believe he asked you if you did or if you did not. What is the fact about that?

A. (Continuing): Yes. We made a previous appointment. [43] I was to call him as soon as I had made some arrangements here in Seattle or wherever it might be in regards to the sale of the morphine.

The Court: What do you mean by the words "previous appointment?"

The Witness: I should correct that, maybe, in this way. I told him that I would call him as soon as I had made some arrangements as to the sale of the narcotics.

The Court: Do you mean a future appointment?

The Witness: Yes, sir.

The Court: Or a past appointment?

The Witness: That would be a future appointment.

The Court: Is that what you mean by the term

(Testimony of Harvey Naylor.)

“previous appointment” that you mentioned before?

The Witness: That is what I meant—that I would call him as soon as I had made some arrangements in regards to the sale of the narcotics.

Q. (By Mr. Sager): How were you to call him?

A. Well, we made—either Tuesday or Friday was the day I was supposed to call.

Q. Mr. Naylor, how were you to get in touch with him—did he say?

A. By telephone; I called him by telephone. I went up [44] there to Everett and called him again from Everett.

Q. About how long was that after the time he saw you at the Ritz Hotel?

A. I would say less than a week.

Q. You went to Everett, is that what I understood you to say?

A. Yes, sir.

Q. From where did you call him?

A. Well, sir, I am not sure just where I called him from at that time, whether it was the bus depot or a tavern. I couldn't rightly say. I stopped there some place and took a phone. I am not too well acquainted with Everett.

Q. Was it in Everett that you called?

A. Yes, in Everett. The first time I called from Seattle.

Q. What was your conversation when you called him?

(Testimony of Harvey Naylor.)

A. I asked him when and where I could see him.

Q. What did he say?

A. He told me to come to his office at 5:00 o'clock that evening, and there would be no one there but myself.

Q. Did you go to his office?

A. Yes, sir; about five minutes or ten minutes past 5:00.

Q. Was there anybody present there at that time? [45]

A. As far as I know, himself.

Q. What occurred then at that time?

A. Well, he showed me this box of narcotics that he had.

Mr. Dailey: Will you please speak a little louder?

The Court: Read the answer, Mr. Reporter.

(Last answer repeated by the reporter.)

A. (Continuing): I checked them over to see what was collateral and what was not.

Q. (By Mr. Sager): What was that?

A. What could be sold and what could not—what was good and what wasn't good as far as the market was concerned.

Q. Did you count them or make any estimate of their quantity?

A. Well, we made an estimate of them.

Q. What was that?

A. Oh, there was perhaps,—I think we figured something like 700 or 800 grains altogether,—

(Testimony of Harvey Naylor.)

around in that vicinity. We just guessed at the bottles.

Q. Did you discuss that with Mr. Barnett?

A. Oh, yes.

Q. Just tell what the conversation was as best you recall.

A. Well, we emptied this box of narcotics out on his [46] desk, to see what was good. This was codein and a different assortment of narcotics, some that were good and some that were not good. That is about what that consisted of. We merely took stock of what we had on hand there, and it—as near as we could figure—was around 700 or 800 grains of morphine.

The Court: Of what?

The Witness: That was of morphine.

Q. (By Mr. Sager): What sort of a box were they in?

A. Well, I would say it was a good-sized cigar box—large cigar box.

Q. How were they inside the box—were they in any other container?

A. No. The cigar box was wrapped in a paper was all. And, of course, the box was full of bottles.

Q. Were the tablets in the bottles?

A. Yes, sir; yes, sir, they were.

Q. Did you have any further conversation with Mr. Barnett there at that time?

A. Well, I told him after finding out what he had that I would go back to Seattle and see what

(Testimony of Harvey Naylor.)

I could do in regards to selling them for him. There was a lot of money—he wanted \$10,000 for it and it [47] was a little steep. I tried to get the price down a little. I couldn't meet that kind of a price, myself. It seems as though he couldn't come down on the price.

Mr. Dailey: I object to what his conclusion is.

Q. (By Mr. Sager): Don't state what you thought or your conclusion.

A. I am just——

Q. Just state your conversation.

A. That is what my conversation was—what I am saying. As I said, I would go back to Seattle and call him as soon as I had found someone that wanted the narcotics. I was hoping in the meantime he would see fit to come down on the price, where I could get some.

Q. Did you at that time discuss the price with him?

A. Yes. He wanted \$10,000, and I told him it was clear out of the question to get any part of that. \$10 a grain is rather high any place.

Q. Did anything else occur on that occasion?

A. Well, he gave me a small amount for samples.

Q. How much did he give you?

A. Well, he gave me two bottles of cocaine, one bottle [48] of 100 H.M.C.

Q. What does that mean?

A. That is hyosine, morphine, cactine, I believe.

(Testimony of Harvey Naylor.)

The Court: How much was there of that?

The Witness: I believe there was a bottle of 100 tablets. I believe it was a full bottle.

The Court: What do you call that?

The Witness: H.M.C., that is the stock name of it, "H.M.C."

Q. (By Mr. Sager): I didn't hear, yet.

A. Hyosine, morphine and cactine. That is the three ingredients.

The Court: The last one?

The Witness: Cactine.

The Court: Can you attempt to spell the first and third words of that group?

The Witness: Hyosine?

The Court: Yes. How do you spell it?

The Witness: I would say h-y-a-s-i-n-e. That is as close as I can come to it.

The Court: How would you spell the last word in the group of three—cactine?

The Witness: I can't honestly say. I don't know. [49]

The Court: You may proceed. What else was there in this box besides the two types of products that you have mentioned? Those are samples that he gave you, is that right, two bottles of cocaine, one bottle of tablets of H.M.C., and what else did he give you?

The Witness: He gave me some quarter and a half grains of morphine.

The Court: Did he give you any other samples?

(Testimony of Harvey Naylor.)

The Witness: Not at that time.

The Court: What was it you said this box contained—how much morphine did you say?

The Witness: In the vicinity of 700 to 800 grains, somewhere around there. We didn't count them. We just made an estimate.

The Court: What if anything else did it contain?

The Witness: Well, it had a considerable amount of codeine. I couldn't say as to how much. There was a large amount.

The Court: What else, if anything?

The Witness: A bottle of dolophine.

The Court: Anything else?

The Witness: There was, but I don't recall the different medical names for them. Some were [50] names that I had never heard of before and were strange to me.

(Narcotic drugs in cigar box marked Plaintiff's Exhibit 1 for identification.)

Q. (By Mr. Sager): Mr. Naylor, the bailiff is handing to you Plaintiff's Exhibit 1 for identification. Will you look at that and examine the contents and tell us whether or not that appears to be what you saw in Mr. Barnett's office?

A. That seems to be it, sir. In fact, it is it.

Q. Will you put those all back in the box, then, and return them to the bailiff?

A. Yes. (Witness replaces bottles of narcotics in cigar box.)

Q. Now, Mr. Naylor, did you see Mr. Barnett

(Testimony of Harvey Naylor.)

at any later times after this first visit of yours to Everett?

A. Yes. I went back up again and had another talk with him.

Q. About how much time elapsed between the first visit and the second visit?

A. Well, I don't think it was a week; less than a week, I would say.

Q. Where did you see him on this second occasion?

A. In Everett again, the same way—telephone.

Q. In his office? A. In his office.

Q. About what time of day was it?

A. Well, before I seen him it was again late.

Q. I didn't hear your answer.

A. It was at about the same time in the evening, when there was no one in his office.

Q. What occurred on that occasion?

A. I was trying to get the price down to where I could get ahold of some of that stuff. I didn't succeed. He still wanted \$10,000. I tried to get some samples but I didn't get any more that time, I don't think, if I remember rightly—the second time. So I went away with the same deal, that I would call him as soon as I heard anything. I told him that I knew of a man that might be interested as soon as he returned to town. And so I left again.

Q. Did you know of any such man?

A. No, sir.

Q. Did you have any \$10,000 or any such sum to buy these, Mr. Naylor?

(Testimony of Harvey Naylon.)

A. No—or they wouldn't be here. I would have bought them.

Q. What was your purpose in going back and forth there from time to time? [52]

A. Well, I was trying to get the price down to where I could buy some. I was trying to show him how ridiculous it was to charge \$10.00 a grain for such a large amount. It would be impossible for anyone to pay that much money.

Q. For what purpose did you want the drugs?

A. Well, to use, sir.

Q. Mr. Naylon, I want to refer back to the first case when you went there. Where did he have this box of drugs when he first brought them to you?

A. Oh, they remained more or less of a history as to where they came from. But he would have me wait outside some place for a few minutes, a short time, and when I came in his office he had them on his desk.

Q. You had been in to his office before that?

A. Yes.

Q. Did you see them the first time?

A. My first trip up there?

Q. Well, the first time you went into the office, did he have them in the office on that occasion?

A. On the first trip up there they were there at my first entrance. He had them present at my first entrance there. But the other times, why, I had to wait until he had got them from some place else.

Q. Did he tell you where he had to go to get them?

A. No, sir.

(Testimony of Harvey Naylor.)

Q. What did he have you do while he went for them?

A. Well, I would just wait for a few minutes, five minutes or ten minutes, and then he came back.

Q. Did you wait in his office?

A. No; outside in the hall somewhere.

Q. Did you make other trips up to Everett?

A. Yes, I made another one up there, a third trip. This was the trip that I told him that I had a man with me that was interested in it. I was beginning to see where he was not going to come down in price where I could get any and I was trying to figure how else I could get some of it.

I told him that I had a man interested with the money and that I wanted some of the morphine for my trouble in getting this man. We had a little talk as to when I should get this—before or after the deal.

Well, being there wasn't any deal, I had to convince him in some way to get the morphine first, which I did, and he gave me some more. I was supposed to bring this man back upstairs with me, but as I say I didn't have no one there.

Q. You didn't what? [54]

A. I didn't have any man there. It was just a story. It was untrue about this man. I didn't have a buyer at all. I merely used that as a ruse to get some of this medicine from him which he gave me.

Q. How much did he give you on that occasion?

A. Well, I never really counted it. I poured some out on a paper, and went a little heavy on it and I had to put some back. I didn't count them.

(Testimony of Harvey Naylor.)

I don't know just exactly what quantity it was, sir.

Q. Mr. Naylor, on the occasion of your first visit up there when you examined these drugs, just how carefully did you look them over?

A. Well, I had to look at each and every bottle to see what was an opiate, what was usable and what was not. I looked them over quite carefully. We used paper towels we had there to keep our fingerprints off of them.

Q. Just tell us about that, will you?

A. Which—the fingerprints?

Q. Yes, whatever was said or done concerning that.

A. Well, we didn't want our fingerprints on the bottles.

Q. What is that?

A. We didn't want our fingerprints on the bottles.

Q. Was there anything said about it?

A. Well, yes; in a way. Mr. Barnett had a box of kleenex [55] I guess you would call it—paper towels. We used this kleenex and, as we looked at each bottle, we rubbed any possible prints there might have been on the bottles off as we looked at them which was a good idea.

Q. Did you use the kleenex in handling the bottles—in picking them up? A. Oh, yes.

Q. Did Mr. Barnett? A. Certainly.

Q. Mr. Naylor, on any of these trips to Everett, when you saw Mr. Barnett, did you go to the County Jail?

A. Yes, sir; on the first trip up there we—I forgot to mention that. On our first trip up there, we went to the County Jail—I guess it was the

(Testimony of Harvey Naylon.)

County Jail—it was where this lad was being held.

Q. What lad?

A. This Mr. McCarthey. We went in there. This was before I had seen the morphine. We seen Ralph McCarthey. They brought him out and we talked to him, the three of us. He then first told us how much he wanted for them—\$10,000.

Q. Who told you that?

A. Mr. McCarthey. I didn't argue the point with him.

Q. I have trouble hearing you. [56]

A. I say he was set in his price and so we didn't argue the case at all. I figured I would talk to Mr. Barnett afterwards in regard to that. I figured I would let him say what he wanted to and let it go at that. He wanted \$10,000.

Q. Where were you talking to him at that time?

A. Well, there is a little hallway there between there and the cell I imagine he came out of, and the jailer's desk which is about 20 feet long, the hallway. We were in the center of that hallway, sitting on the table.

Q. Who was there?

A. Mr. McCarthey, Mr. Barnett, and myself.

Q. Did you all participate in the conversation?

A. Most of it, yes, sir.

Q. Was there anything else said there at that time?

A. I don't think anything that I haven't mentioned. It was a short conversation and pertained mostly to the narcotics—as to what he had—how

(Testimony of Harvey Naylor.)

much he had, rather—and how much he wanted for it. That was about all it amounted to.

Q. Do you recall whether or not anything was said about your getting a sample of them at that time?

A. Yes. He told me I could have a sample of them.

Q. Who said that? [57]

A. Mr. McCarthey told Mr. Barnett to give me some. I asked him if it was strictly up to him, on his hands, and he said, “Yes,”—to do anything he said to do.

Q. You asked who?

A. Mr. McCarthey. I didn’t think yet that Mr. Barnett had all of the sale of it. But he told me, to do what he said and it would be all right in regard to the sale of the narcotics.

The Court: You speak of Mr. McCarthey. I don’t believe it has been made plain to me of whom he is speaking.

Q. (By Mr. Sager): Is that Ralph R. Macartney?

A. Macartney. I don’t know just how you pronounce the last name—Macartney or McCarthey. I call him McCarthey.

Q. Was he in jail there at that time?

A. He was in jail in Everett, yes.

Q. Mr. Barnett took you down there to see him?

A. Yes, sir. He took me to the cell to see this Mr. McCarthey.

Q. Had Mr. Barnett previously told you that he

(Testimony of Harvey Naylon.)

represented him as an attorney? A. Yes, sir.

The Court: Have you later seen that man—[58]
Macartney?

The Witness: I haven't seen him since, no, sir.

The Court: You have not?

The Witness: No, sir.

Q. (By Mr. Sager): Mr. Naylon, did you ever discuss during these visits to Everett with Mr. Barnett—did you ever discuss with him where this box of drugs came from?

A. Well, not exactly where they come from. That was more or less of a secret.

Q. Speak a little louder, will you?

A. That was more or less of a secret on his part, I guess.

Mr. Dailey: If Your Honor please, I move that that be stricken. When he says, "I guess" I [59] think he is testifying to a conclusion.

The Court: "But that was more or less a secret on his part, I guess" are words which are now stricken from this record and the jury will disregard those words. Lay them out of your minds.

Q. (By Mr. Sager): Just state what the conversation was, Mr. Naylon.

A. Well, I told him that the narcotics was hot—unquestionably they were hot, and I was still trying to get the cut-down was my reason for telling him that. It stood to reason that they were hot in more ways than one, and I thought by telling him that—

Mr. Dailey: I object, Your Honor.

(Testimony of Harvey Naylor.)

The Court: The objection is sustained. You are permitted to say what was said and not to comment on the reasons therefor or your state of mind except insofar as your state of mind was expressed in words. It is the words you are permitted to state—those said by him or you.

The Witness: That is what I was saying, Your Honor.

The Court: Make it clear that that is what you are saying. Don't make it sound like your [60] comments on what transpired are some attitude.

Q. (By Mr. Sager): You understand the Court's direction, Mr. Naylor; you are to only testify what the conversations were and not what you were thinking or were assuming or anything of that sort.

Now, what was said by you and what was said by him, as nearly as you recall?

A. That is what I tried to say. You asked me the question and I tried to answer it the best I could as to what was said. The words I spoke was what was said. They weren't thought. I said them.

Q. Tell us what you said to Mr. Barnett concerning these drugs?

A. You keep stopping me. I told him that the narcotics were hot and the best thing he could do would be to throw them in the river—as far as he was concerned he would be better off.

Q. Did he make any response to that?

A. Yes. He said perhaps it would be the best thing but he had an interest in them and he was

(Testimony of Harvey Naylor.)

going to go through with it.

Q. Did you state to him any reasons why they were hot?

A. Like I tried to say awhile ago I didn't know where they came from but it stands to reason that they more [61] than likely were stolen.

Q. Did you tell him why?

A. He wouldn't say whether they were or they weren't. I was trying to impress on him that I had an idea that they were plenty hot, trying to get the price down lower. I can't pay \$10,000—but if I could have gotten it down within reasonable reach I would have bought some. That was the whole argument between he and I, as to price, to get it down.

Q. In discussing the price or any transaction that you have made with him, did you at any time ever have any discussion with Mr. Barnett as to what you would get out of it?

A. Well, on our first trip up there—that is when we were talking to Mr. Macartney, when he said he wanted \$10,000 which he said was the price and he knew price, he told me if I would get \$8,000, I could keep \$2,000 for myself.

Q. Who said that to you?

A. Mr. Macartney said that.

Q. Was that down in the jail?

A. In the County Jail, yes, sir.

Q. Was that the occasion you spoke of before when the thre of you were there present?

A. Yes, sir. [62]

(Testimony of Harvey Naylor.)

Q. You stated here previously, Mr. Naylor, that on one occasion you told Mr. Barnett you had a man that might be interested in them.

A. Yes, sir.

Q. And on another occasion you stated, as I recall, that—you advised Mr. Barnett that you had a man down on the street who was ready to buy if you could get the price right?

A. That was my third trip up there; yes, sir.

Q. Did he make any inquiry of you as to who these alleged purchasers were?

A. Only to the extent that I think they were safe to do business with, if that is what you mean.

Q. Yes. Did he inquire where they were from or anything else about them?

A. I don't recall that, sir.

Q. Did he at any time tell you anything concerning his own participation in the sale of these?

A. Do you mean as to what he would benefit?

Q. No. A. What do you mean?

Q. As to what part he was to have in disposing of them.

A. I don't know what you mean. He didn't want to have too much to do with it, at first, if that is what you mean. [63]

Q. What did he say in that connection?

A. Well, in our first meetings, why, in the transaction of actual sale of these narcotics, if and when it came up, he wanted to be in the background as much as possible; that is, he apparently didn't want to be caught. That is what it came down to.

(Testimony of Harvey Naylor.)

Q. What did he say?

A. That is what he said.

Q. How many times did he come down to Seattle to see you?

A. Well, I don't think more than three times. I may be off one; it may have been four, but I think three times would just about cover it, as close as I can recall.

Q. How many times did you see him in Seattle?

A. Did I see him personally?

Q. That is right.

A. Let me see. I don't believe I seen him but once in Seattle. I may be mistaken there again but I can't quite recall only the first time meeting him in Seattle, myself, although he was here more often.

Q. You did see him one time in Seattle?

A. The first time he looked me up, yes, sir.

Q. You are not quite sure whether you saw him again or not in Seattle? [64]

A. The second time he came looking for me, as near as I can recall, and I didn't answer. I let my wife talk to him.

Q. When was that with respect to your third visit to Everett?

A. Well, that is the time that I told him I would be right back with the man, and he had given me some morphine for the supposed transaction and I thought he might be a little mad. I didn't know whether I was going to get punched in the nose or what I was going to get, so I didn't say anything. I let my wife talk to him.

(Testimony of Harvey Naylor.)

Q. Did you go back up to Everett following your visit to Mr. Barnett's office? A. Yes.

Q. Just what occurred prior to that, leading up to that trip?

A. Well, it was perhaps a week later, as near as I recall, about. I called him on the phone from Seattle again and asked him how everything stood.

Q. Where did you call him by phone—from where? A. From where?

Q. That is right.

A. The Narcotic Bureau.

Q. What had you done before you made that call from the Narcotic Bureau? [65]

A. What had I done?

Q. That is right.

A. I am afraid I don't understand what you mean.

Q. Well, how did you get up to the Narcotic Office? A. I came up.

Q. Had you called him before you came up?

A. Oh, yes—I see. Yes, I called Mr. Crisler on the telephone.

Q. Then what happened following that call?

A. He asked me to come up to the office.

Q. Did you see one of the agents before you came up to the office?

A. Yes—Mr.—Henry something.

Q. Giordano?

A. Giordano. He came down to the restaurant and met me.

(Testimony of Harvey Naylor.)

Q. Did you tell him something concerning this matter at that place? A. Yes.

Q. Following that did you come up to the office?

A. Then we came up to the office.

Q. Without telling what you told him, did you report to the narcotic agent as to what had transpired between you and Mr. Barnett?

A. Yes, sir. [66]

Q. Then what was done?

A. Well, I made another phone call to him to see how we stood; to see whether they had sold the narcotics yet or not.

Q. And that call was made from where?

A. That was made from the Narcotic Office.

Q. Who arranged that call?

A. Who arranged that call?

Q. That is right.

A. Let me see—Mr. Crisler was there.

Q. He is one of the Narcotic Agents?

A. Yes, sir. And this Henry Giordano was there. I believe he was the one that put the call through—either him or Mr. Crisler, I believe, put the call through for me to Everett. And when we located him, I believe he was at his home if I am not mistaken. I think it was on a Saturday afternoon. Anyway, his office was closed.

Q. Speak a little louder.

A. His office was closed and we had a little difficulty in getting hold of him, but we finally reached him. I believe at his home.

Q. Then did you talk to him? A. Yes, sir.

(Testimony of Harvey Naylor.)

Q. What was the conversation over the phone?

A. I asked him how things stood between us—whether he still had the narcotics. He said it was the same as it was before. I asked him if he would be interested in taking \$6 a grain for it—that I had a buyer that would take it at \$6 a grain immediately. He said he was tired of fooling around with it, that he would let it go at \$6. So we made an appointment for that same day, which was about 5:00 o'clock that evening I believe, and went up there to Everett.

Q. Where in Everett were you to see him?

A. In his office in Everett.

Q. Did you go up there?

A. Yes, we went straight to his office.

Q. Who went up there?

A. Mr. Goode and myself went into his office.

Q. Who went with you up to Everett?

A. Mr. Goode, Mr. Crisler, Mr. Graben, and Mr. Giordano again.

Q. They are all Narcotics Agents?

A. Narcotics Agents.

Q. When you got to Everett, what did you do?

A. Well, Mr. Goode and I—he was supposed to be the buyer. He and I went up to Mr. Barnett's office. I introduced them.

Q. How did you introduce them? [68]

A. I told him he was the fellow I had contacted in Seattle, and that he had just come to town and he was interested in buying the narcotics; that he thought he could make a few dollars on it, himself,

(Testimony of Harvey Naylor.)

by reselling it. We agreed on the price, which I said was \$6 before, but he wanted to count it.

Q. Who wanted to count what?

A. Mr. Goode wanted to see the narcotics, to count it. He had to step out in the hallway.

Q. Who did?

A. Mr. Barnett. He had Mr. Goode and I step out in the—his office is at the end of the hall. There is also a back stairway there. That is where he had us wait for him, for about five minutes, I believe, and he returned with this box of narcotics.

Q. Did he say why he wanted you to wait in the stairway?

A. He said until he went and got this box of narcotics. In about five minutes he returned and called us in the office. When the three of us went in the office, why, sure enough! here was this box of narcotics, that I had seen awhile ago on the counter.

Q. Then what happened?

A. After we opened the box and Mr. Goode seen what was in it, that was all; he put him under arrest.

Q. Then what happened—then what did you do?

A. Well, Mr. Goode sent me downstairs to get the other boys to come up. They were down in front. I went down and had them come upstairs.

Q. And then what happened, so far as you were concerned?

A. Well, I stayed around there for awhile and then I went home.

(Testimony of Harvey Naylor.)

Q. Did you get some more of these drugs there?

A. Well, yes, I did. I took some—took them away from him.

Q. When did you do that?

A. Just before I went downstairs to pick up the other three fellows.

Q. How did you do that?

A. Well, I poured them out on the desk—when nobody was looking, I thought—and put some in my pocket. Somebody seen me, I guess.

Q. Then what happened later?

A. When I got downstairs, Graben and this Henry, again, took them away from me.

Q. Did you put them in anything after you got downstairs?

A. Yes. I put them in a little tin can that I had that was all fitted out.

Mr. Sager: Will you give the witness the exhibit?

(Cigar Box, Exhibit 1, handed to the witness.) [70]

Q. (By Mr. Sager): Will you examine the contents of that Exhibit 1 for identification and state what that metal box is there, now?

A. Yes.

(Witness removes metal container from Exhibit 1.)

Q. After they got that back from you, did you leave then? A. Yes. I took a bus home.

(Cigar box, Plaintiff's Exhibit 1, replaced on Clerk's desk.)

(Testimony of Harvey Naylor.)

The Witness: That is a dirty trick!

Q. (By Mr. Sager): Mr. Naylor, have you ever been convicted of a crime? A. Yes, I have.

Q. Where and what?

A. In 1923 for larceny.

Q. Where was that? A. California.

Q. Have you ever been in jail for any other offenses? A. Yes—petty offenses.

Q. What do you mean by petty offenses?

A. Well, I have been picked up for using narcotics, mostly. [71]

Q. How many times?

A. Oh, my! I don't know. Every once in awhile they take me down and let me get myself well—what they call it.

Mr. Sager: You may inquire.

Cross Examination

By Mr. Dailey:

Q. You had known Mr. Macartney, before, had you not, Mr. Naylor?

A. Previous to my meeting him at the Ritz Hotel?

Q. Yes.

A. No. He was just an acquaintance that I had made a matter of weeks before I met Mr. Barnett, there.

Q. When did you first meet Mr. Macartney?

A. Well, I hadn't know him over a month, I am pretty sure, before I met Mr. Barnett.

Q. Where did you meet him?

A. At the Ritz Hotel.

(Testimony of Harvey Naylor.)

Q. In the Ritz Hotel. Were you staying there?

A. At the time we both were, yes.

Q. What?

A. At the time we were both living there.

Q. Did you associate together some prior to the time that Barnett came up? [72]

A. The only time we had any association, he came up to my room and had a drink of whisky and went right out—ten minutes' association.

Q. Had he ever helped you by loaning you money at any time? A. No, sir.

Q. Had he helped you by letting you have money when you were in necessitous circumstances?

A. No, sir.

Q. When Barnett first came and saw you, he told you that Macartney wanted to see you, did he not?

A. He told me he wanted to see me about some narcotics. I guess he told me he wanted to talk to me.

Q. And your first trip up there was expressly to see Macartney, wasn't it? A. To see him?

Q. Yes.

A. That and to see the box of narcotics.

Q. To see the box of narcotics?

A. Yes, sir; to see what there was there.

Q. And then he took you up to the jail and you and Macartney talked there for some time?

A. Yes, sir.

Q. While you and Macartney were talking there, he was talking to the jailer, wasn't he—Barnett?

(Testimony of Harvey Naylor.)

A. At first he was. Then he stepped back and talked to us in our conversation.

Q. Who was it that first suggested to you that you make some arrangement for the sale of this—Macartney or Barnett? A. Mr. Barnett.

Q. Where was that? A. In the Ritz Hotel.

Q. That was before you ever went up there?

A. Yes, sir.

Q. Did he tell you that Macartney said he had some narcotics?

A. He didn't say too much. The whole thing was just a little hazy on our first meeting there as to who had them and where they were—kind of feeling around there, I guess.

Q. You were not under the influence of narcotics at that time, were you?

A. I don't remember whether I had any that day or not. I can't remember that far back. I may have and I may not. I can't say for sure.

Q. When you first talked price, Macartney told you he wanted \$10,000 for it, didn't he?

A. Yes, sir.

Q. That was the first talk you ever had with anybody about price, wasn't it? [74]

A. Well, I couldn't answer that yes or no for sure.

Q. You don't know. And you told him at that time that it was rather high? A. Yes, sir.

Q. And then you told Macartney that you doubted there was any such stuff in existence, didn't you?

(Testimony of Harvey Naylor.)

A. I didn't put it that way. There was a little doubt in my mind as to whether this was true. It sounded a little fabulous to me.

Q. How did it happen that Macartney told Barnett to give you some of it?

A. How did he tell him to give me some?

Q. Yes.

A. I told him I was sick and asked him if I could have some.

Q. You told Macartney you were sick?

A. Yes.

Q. And you asked to have some? A. Yes.

Q. And did he tell Barnett how much to give you?

A. He said to let me have about ten grains.

Q. How much did Barnett give you?

A. He let me count them out myself. I took a few over 10 grains.

Q. How much over? [75]

A. I don't know. I didn't count them.

Q. Twice as much as ten grains?

A. Perhaps.

Q. Three times as much?

A. I couldn't say. I didn't count them. I just took some other than the ten grains.

Q. You just took what you thought you could get away with, is that it? A. Yes, sir.

Q. Then you went up to see him about a week later, you say. Was that on the following Tuesday?

A. It was perhaps either on a Tuesday or a

(Testimony of Harvey Naylor.)

Friday, sir. Those were the two meeting days that he expressed were the best to meet him.

Q. When you went up, you didn't go to see Macartney that day, did you? A. I didn't, no.

Q. You went to see Barnett, didn't you?
A. Yes.

Q. You took along with you a diamond ring, didn't you? A. Yes, sir.

Q. You tried to sell it to Barnett?

A. I tried to sell it or trade it for morphine.

Q. You tried to sell it for \$200 to him, first, didn't you? [76]

A. The money was no object. The morphine is what I wanted.

Q. Did you try to sell it to him at first for \$200?

A. No.

Q. Then did you try to sell it to him for \$50?

A. As near as I know, I tried to trade it for morphine. I wasn't interested in money.

Q. You tried to sell it and then trade it for morphine, didn't you?

A. There would have been no object in that. Had I got the money, I would have turned it into morphine, anyway.

Q. He told you that he didn't have any for sale or that you couldn't buy any or trade it for any, didn't he? A. He didn't put it that way.

Q. How did he put it?

A. He wanted to get the whole \$10,000 or nothing.

(Testimony of Harvey Naylor.)

Q. How much did you want for that ring in striking a bargain?

A. I would have taken any amount of morphine had he given it to me.

Q. Any amount at all? A. Yes.

Q. From one grain up?

A. I wasn't quite that sick to take one grain, but I [77]would have taken anything in reason.

Q. Then when you went up there the last time, you say that was in answer to a telephone call you had made? A. The last time?

Q. Yes. A. I did every time, yes, sir.

Q. What?

A. I made a phone call each time I went up there.

Q. Where did you call from the first time?

A. You are asking me a question that is a hard one to answer there. I believe it was from the restaurant. I couldn't swear to that. I believe it was. I know I made one call from there. Just which call it was, I can't say.

Q. You don't know where he called from the second time?

A. It may have been from the same place.

Q. What?

A. It may have been from the same place.

Q. It may and it may not?

A. That is right.

Q. You don't remember?

A. Not exactly what phone I used, no, sir. I

(Testimony of Harvey Naylor.)

didn't call through the hotel because I don't like to have them listen through the switchboard.

Q. Were you under the influence of narcotics at the time [78] you made the first phone call?

A. I can't remember.

Q. Were you under the influence of narcotics when you made the second call?

A. You are asking hard questions, sir. It is hard to answer if I was or was not.

Q. Well, do you know?

A. If I had had them, I was. At those particular times I was having a hard time getting them. I don't recall if I was or was not.

Q. Were you under the influence of narcotics the day that you called up the Narcotics Agent and reported it to them?

A. I don't remember. I think I was sick?

Q. Why did you report to the Narcotics Agents?

A. I got angry because he wouldn't come down on the price. They were trying to rob me.

Q. "They," meaning Macartney and Barnett, wouldn't come down on the price? A. Yes, sir.

Q. You couldn't have bought any, anyway, could you?

A. I could have got the money to have bought some, not \$10,000 or anywheres near it.

Q. As a matter of fact, you couldn't have raised that much could you? [79]

A. No, sir. That is still a large amount of money for that amount.

Q. That is right. But you couldn't have raised

(Testimony of Harvey Naylor.)

more than a couple of hundred dollars in any event, could you?

A. Possibly a couple of hundred dollars at the best.

Q. And so you got mad because it was there and you couldn't get it and so you reported it to the Narcotics Agents?

A. You can put it that way if you want to.

Q. Well, is that right? I am not putting it this way. I am asking you.

A. I thought it was unfair of him to ask a sick man that kind of money for narcotics, yes.

Q. You thought it was unfair of them and so you were going to report it? A. Yes, sir.

Q. You did report it at first by telephone?

A. Yes, sir; I called Mr. Crisler.

Q. Then which one of the Narcotics Agents came out and talked to you?

A. That Henry Giordano. I can't pronounce that name.

Q. Where did you meet?

A. Manning's Restaurant.

Q. Where? [80] Manning's Restaurant.

Q. Is that where you called him from?

A. Yes, sir.

Q. When was that, do you remember?

A. On what day?

Q. Yes.

A. It was about the first week in February.

Q. And then when was it you came down to the Narcotics Bureau's office and called from there?

(Testimony of Harvey Naylor.)

A. That was immediately after that meeting.

Q. Immmediately after it? A. Yes, sir.

Q. You never had gone back to Macartney again and tried to get him to come down in price, had you?

A. He told me Mr. Barnett would take care of all of the transactions.

Q. When was that?

A. The first and only meeting we had.

Q. You never met Macartney at any other time?

A. No, sir.

Q. But Macartney had told you on the first meeting, you said, that he wanted \$10,000, and if you could get \$8,000, you could keep \$2,000, yourself? A. Yes, sir.

Q. Then it wasn't \$10,000 that he was asking [81] but \$8,000, wasn't it, from you?

A. Putting it that way, yes.

Q. Was he to pay you any commission on the sale?

A. Yes. He said he would give me some more of the morphine.

Q. How much of it?

A. He didn't state any amount; not that I recalled, anyway.

Q. You say at first Mr. Barnett was reluctant to have anything to do with it?

A. He wasn't exactly reluctant. I tried to tell him that he was flirting with dynamite. He admitted he was but that is as far as it went.

Q. He didn't say anything more about it than

(Testimony of Harvey Naylor.)

that? A. Not too much, no, sir.

Q. And on this night that you went up there, you say that you and Goode went up to the office?

A. Yes, sir.

Q. What time was it that you and Goode went up to the office? A. 5:00 o'clock.

Q. At 5:00 o'clock on a Saturday afternoon?

A. About 5:00 o'clock, somewhere around there, yes, sir.

Q. And all you said to him was that Goode was the man that you had brought along and you wanted to look at [82] that stuff? A. Yes, sir.

Q. And Goode said he wanted to count it?

A. He said what, sir?

Q. That he wanted to count it?

A. Yes, sir.

Q. So Barnett got it and you and Goode started to count it?

A. Well, that was all there was to it. When he opened it up, Mr. Goode arrested him.

Q. What?

A. As soon as he opened the package up, Mr. Goode arrested him.

Q. As soon as he opened up the cigar box?

A. Approximately.

Q. You and Mr. Goode didn't count any out on the table?

A. I poured some out of a little bottle on the table and that was it.

Q. Why did you pour some out on the table?

A. I was still figuring on getting some.

(Testimony of Harvey Naylor.)

Q. You were going to grab some of it and put it in your pocket?

A. That's what I thought, yes.

Q. Which you did do, as a matter of fact.

A. Yes. [83]

Q. Then he and Mr. Barnett had some discussion about that, didn't they? A. I guess so.

Q. Mr. Barnett told him that you got some of it, didn't he?

A. I don't know.

Q. Didn't you hear Barnett tell him that you had put some of it in your pocket and hear Goode tell him that he was a liar? A. No.

Q. You didn't hear anything like that?

A. No, because I had gone downstairs.

Q. Had you had any opiates that day, any narcotics?

A. Gee, I don't remember. I didn't have much. I don't think.

Q. Where did you get it?

A. From a doctor.

Q. Did the federal agents give you any?

A. No.

Q. Never at any time? A. No.

Q. Never promised you any? A. No.

Q. This doctor who gave it to you—who took you there? A. To the doctor? [84]

Q. Yes. A. I went myself, sir.

Q. Who sent you there? A. No one.

(Testimony of Harvey Naylor.)

Q. Were any arrangements made by anyone else for you to go there and get any narcotics?

A. I don't know what you mean. No, sir, I just went to the doctor's office.

Q. You don't mean that you can go to a doctor and get narcotics whenever you like, do you?

A. No. It is not that easy.

Q. Who made arrangements for you to get it that day?

A. There was no arrangements made.

Q. But you did go to a doctor and get some?

A. Yes.

Q. You had no trouble about it?

A. Yes, you have trouble. You sometimes have to go to a dozen. If you keep going long enough, you will find one here and there who will give you some.

Q. So you actually were under the influence of narcotics when you went to Everett that time?

A. I could have been.

Q. You could have been each time you went?

A. I could have been, yes. As I say, I was getting some sometimes and sometimes I was not. [85]

Q. You were convicted, you say, in 1923 of larceny in California?

A. Yes, sir.

Q. How long did you serve?

A. Two years.

Q. When did you come to Washington?

A. I first came here in 1905.

Q. But I am talking about '23.

A. 1933.

(Testimony of Harvey Naylor.)

Q. 1933? A. Yes.

Q. Have you been here in Seattle ever since?

A. I have been out, but most of the time I have been here.

Q. Do you work? A. Yes, sir.

Q. What do you do?

A. Bell boy captain.

Q. Bell boy, where?

A. I have been at the Oxford Hotel for the last three years until recently.

Q. Where are you working now?

A. Rest Home; my wife and I both work up there.

Q. Have you ever been convicted of peddling narcotics?

A. I have never sold a grain of narcotics in my life, [86] no sir.

Q. But you have bought it? A. Oh, yes.

Q. These other offenses that you have been jailed for were such as using narcotics—that would be vagrancy?

A. Disorderly person they call it here.

Q. What?

A. Disorderly conduct or disorderly person they call it here, I believe.

Q. You never have been charged with any other crime?

A. That is the only time I have ever been in the penitentiary.

Mr. Dailey: I think that is all.

(Testimony of Harvey Naylor.)

Mr. Sager: That is all, Mr. Naylor.

The Court: You may be excused.

(Witness excused.) [87]

JOSEPH E. GOODE

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

A. Joseph E. Goode.

Q. How do you spell your last name?

A. G-o-o-d-e.

Q. What is your present occupation, Mr. Goode?

A. Federal Narcotics Agent.

Q. You are stationed where?

A. Here in Seattle.

Q. Were you in that occupation in February of this year?

A. I was.

Q. Do you know Harvey Naylor—

A. I do.

Q. —the witness who was just on the stand?

A. I do.

Q. Did you have occasion to see him in the Narcotics Office on February 7th of this year?

A. I did. [88]

Q. Just tell us what occurred at that time, Mr. Goode.

(Testimony of Joseph E. Goode.)

A. I was in the Narcotics Office around 1:30 or 2:00 o'clock, when Mr. Naylor came to the office. He made a telephone call—this Agent Giordano did—and got, well, I don't know what. In the conversation—I had heard his side of the conversation, what he was saying on the phone.

Q. What happened after the conversation?

A. After the conversation, Mr. Crisler, the District Supervisor, myself, Agent-Inspector Graben and Inspector Giordano and Harvey—Mr. Naylor and I—drove to Everett, Washington.

Q. What did you do after you drove to Everett, Washington?

A. We got to Everett, Washington, about a quarter to 5:00. Mr. Naylor and I got out of the automobile and we killed a little time until around 5:00 o'clock, when we went into the Central Building, and Room 313, the office of Mr. Barnett.

Q. Had you ever seen Mr. Barnett prior to that time?

A. I never had, no, sir.

Q. Did you go into his office?

A. I did.

Q. Was Mr. Naylor with you at that time?

A. He was.

Q. What occurred after he got in the office?

A. After I got in the office, Mr. Naylor introduced me to Mr. Barnett as "Joe" the man that had the money to buy the narcotics.

Q. Was anybody else present there at that time?

A. There was not.

Q. Go ahead, what else happened?

(Testimony of Joseph E. Goode.)

A. After conversation, I had two one-dollar bills, two fifty-dollar bills and two one hundred-dollar bills folded up in my pocket.

Q. Pardon me, Mr. Goode. Did you say anything to Mr. Barnett as to who you were or where you were from?

A. I told him I was a gambler out of Portland, during the conversation, yes, sir.

Q. Did he say anything in response to that?

A. No, sir. I don't remember that he said anything to that.

Q. Tell us as you recall generally just what the conversation was there between the three of you?

A. After I had the money, the conversation was he wanted to go down to the automobile where he said he had the narcotics. I told him, no, I didn't want to do that—there would be no light there. I would rather he would come up to the office so we would have a light and we could look at the narcotics when he had [90] them out, that he had.

Q. All right; go ahead.

A. Well, he said he would go get it. His office was right close to the rear where there were some rear steps there and a door. He put us up on the second landing, the landing between the two floors. He says, "You stay here until I come back. If anybody comes down the steps, you start walking like you are not waiting for anyone." He was gone about five minutes, I would say, or maybe a little longer. He came back and opened the door and

(Testimony of Joseph E. Goode.)

says, "Come on." He went into the main office. There was a little office on the right and another little office on the left.

At this time he took us into the office on the left.

Then he went into the office on the right and brought out a cigar box wrapped in yellow paper with white string. Then he took the string off, opened up the box and I looked at the bottles of narcotics in there. I opened up one of the bottles and he got some Kleenex for me to pour it out on. I poured some of the tablets out, and—I don't know—there were quite a few of them. I said, "It looks like they are all here. I will take it." Then I acted [91] like I was going to bring out the money, but I brought out my badge, and told him he was under arrest.

Q. Did you discuss with him the price you were to pay at any time while you were there?

A. Yes, sir. The price was six dollars a grain.

Q. Just what conversation did you have with him?

A. The conversation was—when I got up there, I was the man with the money. I told him I would not pay over six dollars a grain for the narcotics. And he said he would take that. He said he had about one thousand—at least one thousand grains, and it would be six thousand dollars.

Q. Was there any further conversation, then, as to whether you would buy them or whether he would sell them?

(Testimony of Joseph E. Goode.)

Mr. Dailey: I object to the question, your Honor, as leading.

The Court: The objection is sustained.

Q. (By Mr. Sager): Was there anything else said about the price or the quantity or anything else, Mr. Goode?

A. Well, Mr. Barnett said he would sell them for six thousand dollars. And that was the price agreed on before he went out. Of course, I wanted to see the narcotics which he brought into the room and produced [92] them for me to see them.

Q. Did you tell him you wanted to see them?

A. Yes.

Q. Did you tell him why?

A. Yes. I wanted to be sure it was narcotics before I paid my money.

Q. After he came back, what conversation did you have with him then—after he came back and wherever he went and produced the box of narcotics?

A. I don't recall any conversation after he came back except that he said, "Here is the box of narcotics." And he set them on the table.

Q. Then what did you do?

A. I looked at the bottles in this cigar box, and I had taken one of the morphine quarter grains. He got a piece of Kleenex, and I poured them on the desk and I says, "Well, it looks like all of the tablets are here. I will take it."

Then I showed him my badge and told him I was

(Testimony of Joseph E. Goode.)

a Federal Narcotics Agent and he was under arrest.

Q. Did you examine any of the other bottles?

A. I looked through them—at how many bottles. I didn't count the bottles, but there was quite a few there and it looked like there was at least that many grains in the whole box.

Q. Would you show the witness the exhibit marked Plaintiff's Exhibit 1 for identification?

(Cigar box, Plaintiff's Exhibit 1, handed to the witness.)

Showing you, now, Plaintiff's Exhibit 1 for identification, Mr. Goode, do you recognize that?

A. I do.

Q. What is it?

A. This is the box, outside of this one. All of these bottles are the ones he delivered to me in his office.

Q. What did you do with that Exhibit following that?

A. This was all initialed. The box was initialed. There was a paper around this box that he brought up, and a string. It was initialed, too. It has my initials on the box and every bottle in here.

Q. What did you personally do—did you take the box away when you finally left there?

A. No, no. Inspector Graben took the box away.

Q. After you placed Mr. Barnett under arrest, what was said then?

A. I placed him under arrest and I said, "Mr.

(Testimony of Joseph E. Goode.)

Barnett, sit down in the chair, here.” He sat down. I said, “What in the world are you doing in this racket?” and he, as he expressed it, said, “I am [94] just a damned fool, that is all.”

A few minutes after that District Supervisor Crisler, Agent Giordano and Inspector Graben came up.

Q. How did they happen to come up?

A. I don’t know how they happened to come up. I opened the door and let them in the office.

Q. Where was Mr. Naylor in the meantime?

A. I told Mr. Naylor to go out and tell the other agent to come up.

Q. After they came up there, was there any other conversation?

A. I introduced Mr. Crisler to Mr. Barnett. I said, “This is Mr. Crisler. He is our boss, in charge of this district.” Then Mr. Crisler talked to him.

Q. Did you hear that conversation?

A. I did.

Q. Will you tell us what was said?

A. Mr. Crisler says, “Mr. Barnett, just what is this all about?” He says, “Well, I will tell you, I was trying to do a fellow a favor and this is what happens; here I am, caught, lose my law practice.” He says, “Tell us the whole thing—how it come around?” He says, “This Harvey Naylor, you went down to Seattle to see him?” He says, “Yes, I was [95] down two times to see Mr. Naylor.” He

(Testimony of Joseph E. Goode.)

went on and told us that Macartney had told him about this box of narcotics.

Q. Did he say who Macartney was?

A. He said he was a fellow who was in the County Jail down there on grand larceny and he had been representing him—was representing him.

And in the conversation he explained that he had got this box from Douglas; that he had went out to Douglas' home on some highway—I forget just how he explained it—and got this box, and he had had it in his possession since about the 17th.

Q. What day was this?

A. On February 7th.

Q. That is when you arrested Mr. Barnett?

A. Yes, sir.

Q. Go right ahead and tell us what you recall of that conversation?

A. He had had it in his possession since about the 17th, and he had—well, I don't remember the whole conversation. But anyway then he wanted permission to call his wife. There was a telephone there, and Mr. Crisler says, "Well, go ahead and call your wife if you want to." He called his wife, and his conversation, what he says on the phone—he says, "I [96] have been arrested." Then he says, "Well, it was that box I have had in the car all along." He says, "I don't know when I will be home but I will be home as soon as I can." Then he wanted to make bail, and he says—we told him he could call the Commissioner up, there, and if

(Testimony of Joseph E. Goode.)

he could get him up there, we would take him down and let him make his bail that night. He called the Commissioner and we walked from his office down to the Commissioner's office.

Q. Before you get to that, do you recall whether or not he said anything to you about Naylor or seeing Naylor?

A. Yes, sir. He said he made two trips down to Seattle to see Naylor.

Q. Did he say anything about Naylor and he and Macartney talking this matter over together.

Mr. Dailey: If your Honor please, I believe that that is leading. I object to it for that reason.

Mr. Sager: It probably is, your Honor.

The Court: The objection is sustained. Try to get at it by a less leading question.

Q. (By Mr. Sager): Do you recall any additional of his statement to you and the other agents there that [97] evening, Mr. Goode?

A. No, I don't. Mr. Crisler was doing the questioning and he was talking to Mr. Crisler more than he was me. Some of it I heard and some of it maybe I didn't hear.

Q. Are you familiar, Mr. Goode, with the order form that is required in the purchase of tax paid narcotics?

A. Yes, sir.

Q. Did you have such a form to submit to Mr. Barnett in connection with this purchase?

A. I did not.

Mr. Sager: I think you may inquire.

(Testimony of Joseph E. Goode.)

Cross-Examination

By By Dailey:

Q. How long have you been a Federal Narcotics Agent, Mr. Goode?

A. Twenty-four years.

Q. How long have you known Naylor?

A. I have known Naylor for practically three months—no, I take it back; about a month, sir.

Q. Had he ever done any of this kind of work for your office before? A. He had.

Q. In the evening when you went up there, you said Naylor [98] merely introduced you as “Joe” and he said, “This is the man who has the money?”

A. Yes, sir—“This is the man I was talking to you about that has the money.”

Q. “This is the man I was talking to you about that has the money?” A. Yes, sir.

Q. Then you went in. And what was it that you said?

A. I told Mr. Barnett, yes, I had the money—I was interested in it but not at \$10 a grain.

Q. What did you say?

A. I told him I would take it at \$6 a grain.

Q. Then what did he say?

A. He said, “That is satisfactory,” that he would take that.

Q. He said that would be satisfactory?

A. Yes.

Q. Hadn't Naylor told you already over the telephone that he had talked about \$6 a grain?

(Testimony of Joseph E. Goode.)

A. Naylon told me that he had talked to him, yes, sir.

Q. Then there wasn't any reason very much to discuss the \$10.

A. Mr. Naylon brought up the \$10 a grain. I told him I wouldn't be interested in it except at \$6 a grain.

Q. All right. He went down and got it and brought it [99] into the office?

A. He went down and got it, yes.

Q. You didn't agree upon the total amount, the total number of grains, or anything of that kind?

A. Only in this way: He said he had one thousand grains. I said, "If you have got one thousand, I have got \$6,000 and will pay you \$6,000 for it."

Q. When was that?

A. That was before he went out.

Q. Before he went downstairs to get it?

A. Yes.

Q. Then, when he went out and brought it back up, you started to count it?

A. I looked at the bottles in here and poured the tablets out of one of them. I can show you the one I started to pour it out of.

Q. Mr. Naylon started to pour some out, too, didn't he?

A. I didn't see, after I left; Mr. Barnett said he saw Naylon pour some out in his hand. Mr. Crisler said, "Go down and get Naylon and, if he has any tablets, take them away from him."

(Testimony of Joseph E. Goode.)

Q. When Barnett first told you that Naylon had taken some tablets, you called him a liar, didn't you?

A. No, sir.

Q. You didn't say anything like that to him?

A. No, sir.

Q. But you didn't hand him any money?

A. No, sir.

Q. You didn't pay him a cent?

A. No, sir.

Mr. Dailey: That is all.

Mr. Sager: That is all, Mr. Goode.

The Court: Step down.

(Witness excused)

ALLYN B. CRISLER

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name.

A. Allyn B. Crisler.

Q. What is your occupation, Mr. Crisler? [101]

A. District Supervisor of the Bureau of Narcotics, Seattle.

Q. Where is your office?

A. Room 311 in this building.

Q. Did you hold that position on February 7th of this year?

A. I did.

(Testimony of Allyn B. Crisler.)

Q. Did you know Harvey Naylor?

A. Yes, sir.

Q. Did you see him on that day?

A. Yes, sir.

Q. Did you have a call from him?

A. I did.

Q. What did you do after you had this call from him?

A. I told him I would have Agent Giordano come and meet him at Mack's Restaurant, where he said he was.

Q. Did you direct Giordano to go there?

A. I did.

Q. What followed after that?

A. This was on Saturday, and I had just been to the office for a little while, and I had an appointment that I kept and then I went home for lunch, intending to come back to the office. While I was home, I received a call from Mr. Giordano, stating that he would like to have me—— [102]

Mr. Dailey: If your Honor please——

Mr. Sager: Don't state what he said.

A. (Continuing): I had a call from Mr. Giordano and I immediately returned to the office.

The Court: What date was that Saturday you just mentioned now?

The Witness: February 7th.

Q. (By Mr. Sager): Of this present year?

A. 1948, yes, sir.

Q. When you got to the office, who was there?

(Testimony of Allyn B. Crisler.)

A. Agent Giordano and Agent Goode and Harvey Naylor.

Q. Did you have a conversation with Mr. Naylor? A. I did.

Q. What did you do following that conversation?

A. I arranged for a telephone call for Garfield Barnett at Everett, Washington, and was advised by the operator that they were unable to reach him at the office or at his home—that neither phone answered. I told her to keep trying to get him. And after she called and said they had located Mr. Barnett, for him to telephone over to Mr. Naylor to talk with him.

Q. Did you hear Mr. Naylor's conversation?

A. I did. [103]

Q. What did you do following that telephone conversation?

A. I furnished Agent Goode with the sum of \$500 in various denominations of bills, currency, and accompanied Agents Goode, Giordano, Inspector Graben, and Harvey Naylor to Everett.

Q. When you got there, what did you do?

A. Waited in a restaurant across the street from the Central Building until I saw Harvey Naylor leave the building, and then with Agent Giordano and Inspector Graben we met him on the other side of the street in front of the building, entered the building and went up on the third floor to Mr.

(Testimony of Allyn B. Crisler.)

Barnett's office, rapped at the door and was admitted by Agent Goode.

Q. When you got in the office, who was there?

A. Mr. Barnett and Agent Goode were there. Mr. Barnett was seated in a chair and Agent Goode was standing by a table where a cigar box containing various bottles of narcotics was placed.

Q. You say "Mr. Barnett." Do you refer to Garfield C. Barnett?

A. Yes, sir.

Q. The defendant here?

A. Yes, sir.

Q. Had you ever seen him before?

A. No, sir. Agent Goode introduced me to Mr. Barnett and [104] I sat down beside him and said, "Mr. Barnett, what is this all about?" He said, "I was just trying to do a fellow a favor; here goes my law practice and everything I have."

I then questioned him as to how he got involved in the narcotic transaction. He stated that he was representing a Mr. Macartney who was at that time confined in the Snohomish County Jail on a larceny charge and Mr. Macartney had told him he would be able to obtain a large quantity of narcotics which he would like to have disposed of; that Mr. Macartney suggested that he come to Seattle and look up Harvey Naylor at the Ritz Hotel, whom he knew to be a narcotic addict and either handle the narcotics or make arrangements for the disposition.

I asked him if he had come to Seattle and he said he had; that he had been down here on two

(Testimony of Allyn B. Crisler.)

different occasions and that he met Harvey Naylor; subsequently, that Mr. Naylor had come to Everett and the two of them had gone to the County Jail where they talked the matter over with Mr. Macartney and they arrived at a price of \$10,000 for approximately one thousand grains which they thought they had.

I questioned him further how he got the narcotics, and he said he obtained them from a man named Douglas. I was very much interested in Douglas because his name had never come up before in the conversation.

Mr. Dailey: I object to the comment, your Honor. That is not in response to the question.

Q. (By Mr. Sager): Don't state what your interest is. Just state the conversation.

A. I asked him who Douglas was and he said he was a man that had got in touch with him, to turn the narcotics over to him—that he had driven out in the country with his wife to obtain the narcotics.

I questioned him as to the date when he had obtained them, and after consulting his calendar he arrived at the date of January 17th. He said it was on a Saturday night—he and his wife had driven out to the vicinity of Snohomish.

I questioned him further as to how we could reach this Douglas' home. He stated he took the road out from Snohomish to Monroe, and how they had turned under a railroad track, and that he

(Testimony of Allyn B. Crisler.)

lived at a farm. He said that Mr. Douglas had turned over this cigar box containing the narcotics which was at that time on his desk, and that he had them in his car ever since. I asked him if he had given Harvey [106] Nylon any samples and he said he had. I questioned him further as to why he, as an attorney, would become involved in a deal like this, and he said he had just been a damned fool.

Q. There is before you what is marked as Plaintiff's Exhibit for Identification Number 1.

Would you examine that and tell us what it is?

A. This is the box that contained the narcotics that was on the desk in Mr. Barnett's room. I asked him if he had agreed to sell them to Mr. Goode at \$6 a grain. He was a little bit reluctant to say anything about it.

I said, "Didn't Harvey Nylon call you on the phone today?" He said, "Yes." So I said, "I know all about it because his phone call was made from our office." He said, "Yes," he had agreed to sell them to Mr. Goode for \$6,000.

At that time Agent Giordano picked up one of the bottles, and he said, "We were comparing the narcotics contained in this box with an inventory and an affidavit of a loss of narcotics reported to me by the Bayside Pharmacy in Everett."

Agent Giordano held up one of the bottles and said, "Why, this bottle doesn't contain as many narcotics as were reported here." Mr. Barnett

(Testimony of Allyn B. Crisler.)

said, [107] "Well, Harvey Naylor just got some when he was in here." I said, "How did he get any of them?" And he said, "I saw him pour some in his pocket." I told Graben and Agent Giordano to go in the next room and see if Harvey did have them. They went in there and Harvey had gone out the door. They came back with a little tin box of tablets and said they had found them on Mr. Naylor.

About that time I told Mr. Barnett that he was under arrest. It was Saturday night and, unless he could make some arrangements to get the Commissioner to come down to hold an arraignment, it would be necessary to confine him in jail where he would probably have to stay over Sunday, but we would be happy to accommodate him, if he could get the Commissioner down to have an arraignment that night. He said he would call the Commissioner. He put in a telephone call and told a man that he was in some difficulty and would like to have an arraignment. He also asked if he could call his wife.

We told him he could.

He made another telephone call and in his part of the conversation I heard him say, "It was over that box I had hid in the car." About that time Agent Giordano and Inspector Graben returned to the office [108] with these tablets they had recovered from Mr. Naylor. I told them that Mr. Barnett had told me the story substantially as to what Mr. Naylor had told us previously. During the

(Testimony of Allyn B. Crisler.)

time there, while we remained there some time, we all questioned him at different times. We then took him over to the United States Commissioner's office for an arraignment. When I informed the Commissioner of the nature of the charge, he said he couldn't believe it.

And after some discussion he wanted to know all about the case, what happened. I explained it to him. He said he still couldn't believe it, and he said to Mr. Barnett, "Bart, are these men justified in arresting you?" And Mr. Barnett said, "Yes, they are."

At that time the Commissioner set his bail at \$1500.

Q. What was done with the drugs?

A. Mr. Graben had the drugs. We had some discussion there about it after having compared them with the inventory of loss submitted by the Bayside Pharmacy. I suggested that Mr. Graben go down to the Bayside Pharmacy and see if the owner could identify them as stolen drugs. [109]

Q. Were the drugs brought back to Seattle that night?

A. They were.

Q. Who brought them back?

A. Mr. Graben.

Mr. Sager: You may inquire.

Cross-Examination

By Mr. Dailey:

Q. How long have you been a Narcotics Agent, Mr. Crisler?

(Testimony of Allyn B. Crisler.)

A. I have been employed at the Bureau of Narcotics since July 1, 1929.

Q. Here in Seattle? A. No, sir.

Q. How long have you been in Seattle?

A. A year.

Q. How long have you known Naylor?

A. Oh, since some time late last fall.

Q. He has attended to this kind of work for you before, hasn't he? A. Yes, sir.

Q. He has done this kind of work for you before, hasn't he? A. Yes, sir.

Q. When you went up to Everett with him, you, of course, don't know anything about what took place in the office [110] after Mr. Naylor was there. But you say after you came up Mr. Goode and Mr. Barnett were the only two in the office, is that right? A. That is right; yes, sir.

Q. You at that time asked him what was going on and what it was all about and he said he was trying to do a fellow a favor, is that right?

A. Yes, sir.

Q. He told you, didn't he, that Douglas had given these narcotics to him for Macartney?

A. He said that he had been told by Mr. Macartney that this box of narcotics would be delivered to him by a Mr. Douglas.

Q. Are you sure he said that or did he tell Macartney afterwards that it had been delivered by Douglas?

A. Well, it was my understanding—from his

(Testimony of Allyn B. Crisler.)

conversation, it was my understanding that he had never talked with Douglas at all until the delivery of the narcotics was made.

Q. That is right. But I don't follow you there. Didn't he tell you that Douglas had told Macartney at the jail that he would deliver it to Barnett for Macartney?

A. I couldn't say exactly what he said about that.

Q. You couldn't say exactly what he said about that? A. No. [111]

Q. That might have been what he said?

A. It could be.

Q. He said that he got it about what date?

A. I inquired as to how long he had these narcotics; and after consulting the calendar he arrived at the date of January 17th, 1948, because he said he knew it was on a Saturday night and he thought that that was the date.

Q. When he told you that he had been down to Seattle to see Naylon, did he tell you that he came down to see him after he got these narcotics or before?

A. I don't recall that he said at any time whether he had been down before or after he got the narcotics.

Q. Did you ask him why he came down to see Naylon? A. Yes, sir.

Q. What did he tell you?

A. To see how Naylon could dispose of them.

(Testimony of Allyn B. Crisler.)

Q. To see how Naylon could dispose of these narcotics, is that right? A. Yes, sir.

Q. He didn't tell you that he came down at the request of Macartney because Macartney wanted to see Naylon?

A. Yes. He told me he came down to see Naylon, to see whether he could handle the narcotics or arrange for a sale of them—that Naylon had been referred to [112] him by Mr. Macartney.

Q. And he told you that all of these narcotics belonged to Macartney, didn't he?

A. He never did say who they belonged to.

Q. Didn't you ask him who he was trying to do a favor for?

A. He said he was trying to do a fellow a favor.

Q. Didn't you ask him who?

A. Yes. We asked him what he meant about it. Then he went on and related the story I have just stated, telling how he got into the transaction with Macartney, telling him that he could have them available and would like to sell them.

Q. Is that all that was said about it, that you can remember?

A. Oh, there might have been more conversation. I can't remember all of our conversation.

Q. When he said that he had given Naylon something, did he say that he had given him some at Macartney's request?

A. No. I asked him if he hadn't given Naylon samples, and he said, yes, he had.

(Testimony of Allyn B. Crisler.)

Q. Did you ask him why?

A. No, I don't think I did.

Q. Didn't you think someone else was mixed up in the deal [113] as well as him, or did you?

A. I knew it after he brought Douglas' name into the picture, because I had never heard of him before. During my conversation with Naylor, he had never mentioned Douglas at all.

Q. Naylor didn't know anything about Douglas?

A. I don't know. I assumed, from my conversation with Naylor that Mr. Barnett was getting narcotics from Macartney.

Q. I see. You understood from Naylor, then, originally, that Macartney had something to do with it? A. Oh, yes.

Q. But you didn't know how much he had to do with it?

A. No, because Mr. Naylor told me he had taken him to the jail to talk with Macartney.

Q. Did you have a conversation as to the narcotics? A. He said they wanted \$10,000.

Q. What do you mean when you say "they?"

A. Mr. Macartney and Mr. Barnett had agreed upon the price, that they wanted \$10,000 for the narcotics, the day Mr. Naylor talked to them at the County Jail.

Q. That is right; that Mr. Macartney had fixed the price at that time?

A. He said they had fixed the price at \$10,000.

Q. He just said "they." [114] A. Yes.

(Testimony of Allyn B. Crisler.)

Q. After you took him before the Commissioner, there was some talk there about whether or not you were an authorized agent, wasn't there?

A. Yes.

Q. Did you have your credentials with you?

A. It seems as though I didn't have mine. We came in there and I introduced myself to Mr.—I don't recall the Commissioner's name.

Q. Cooper? A. That is right; Mr. Cooper.

I told him who I was, my name, and I said, "We want to get out a complaint against Garfield C. Barnett for narcotics violation." He was very much perturbed about such a statement.

Q. Well, now, I didn't ask you that, Mr. Crisler. I say: Did you have some discussion there about whether or not you had your credentials with you and were an authorized agent for the United States Government?

A. That is what I was trying to lead up to.

Q. All right. You can answer that with one word. You don't need to go into a long dissertation.

A. I can't say positively that I did. It appears that I had nothing but a badge and didn't have my credentials. I asked Agent Giordano to show Mr. Cooper his. [115]

Q. You told him that you were an authorized agent of the government, didn't you?

A. That is right.

Q. And asked him if he was willing to concede it, didn't you?

(Testimony of Allyn B. Crisler.)

A. Mr. Cooper said to me, "Do you know what you are doing?" And I said, "I think we do know what we are doing."

Q. Now, Mr. Crisler. I didn't ask you that.

A. I am just trying to give what the conversation was.

Q. Mr. Cooper asked Mr. Barnett if he was willing to concede that you folks were properly authorized agents when you didn't have your credentials, didn't he?

A. I don't recall him asking that question.

Q. You don't recall. But isn't that when Mr. Barnett told him that he was perfectly willing to do that?

A. Mr. Cooper asked him if we were.

Q. You can answer my question very easily, yes or no, if you remember it.

A. I don't remember it that way.

Q. All right. That is all I am asking you. You don't remember that conversation or anything like it taking place between Mr. Cooper and Mr. Barnett?

A. Well, I remember a similar coversation, but not in those words.

Q. Well, did it have to do with your lack of credentials? [116]

A. No, not that I recall, any lack of credentials.
Mr. Dailey: That is all.

Redirect Examination

By Mr. Sager:

Q. What was that conversation, Mr. Crisler?

(Testimony of Allyn B. Crisler.)

A. Mr. Cooper asked Mr. Barnett. He said, "Are these men justified in—"

Mr. Dailey: If Your Honor please, that has already been gone into. This is purely repetition.

The Court: Objection overruled.

Mr. Dailey: Exception.

The Court: Allowed.

A. (Continuing) Mr. Cooper asked Mr. Barnett if these gentlemen were justified in arresting him on this narcotic charge. He said, "Yes."

Mr. Sager: That is all.

Mr. Dailey: That is all.

(Witness excused.) [117]

HENRY L. GIORDANO,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name?

A. Henry L. Giordano.

Q. What is your occupation, Mr. Giordano?

A. Narcotic Agent with the Bureau of Narcotics in Seattle, Washington.

Q. Were you in that occupation on February 7th of this year? A. I was.

Q. On that day did you have occasion to see Harvey Naylor? A. I did.

(Testimony of Henry L. Giordano.)

Q. Where did you see him?

A. In Manning's Restaurant on Fourth Avenue, between Pike and Pine.

Q. Did you have a conversation with him there?

A. I did.

Q. Following that conversation what did you do?

A. I returned to the office where I had another conversation with Mr. Naylor. [118]

Q. Did he go up to the office with you?

A. He did.

Q. Was there anybody else present at your office at that time?

A. Agent Goode was present and later on this supervisor Crisler and Inspector Graben were present.

Q. During the course of your conversation there, what was there?

A. After considerable conversation, a telephone call was made in the office to which I listened in on an extension.

Q. To whom was that call made?

A. Mr. Barnett.

Q. That is the defendant here?

A. Yes, sir.

Q. Who was the conversation between?

A. Between Mr. Barnett and Mr. Naylor.

Q. Did you make a record of that conversation?

A. I made notes in regard to the conversation.

Q. Did you write down the conversation?

A. Yes. As both parties were talking, I copied down what they were saying.

(Testimony of Henry L. Giordano.)

Q. Do you have those notes— A. Yes, sir.

Q. —with you now? [119] A. Yes, sir.

Q. Will you tell us what that conversation was? You may refer to those notes to refresh yourself as to the details whenever necessary.

A. The conversation started with Mr. Naylon saying, "hello—Mr. Barnett? Do you know who this is?" And Mr. Barnett said, "Yes, I think I do." Mr. Naylon said, "How is everything up there?" And Mr. Barnett said, "The same as before." Mr. Naylon then said, "I have got ahold of that man and he will take everything that you have got. He will only pay \$6 a grain for all that you have got." Mr. Barnett hesitated for quite awhile. Finally he said, "O.K.—right; I will take it." Then Mr. Barnett said, "When can we see you—today or tomorrow?" And Mr. Barnett said, "Well, any time." Mr. Naylon said, "Well, how about today; what time can we see you today?" or he said, "What time is it now?" and Mr. Barnett said, "2:30." And Mr. Naylon said, "What time can we see you?" Mr. Barnett said, "About 4:00 or 5:00." He said, "You had better make it closer to 5:00 o'clock; my wife is out with the car."

Mr. Naylon said, "We will be there at 5:00: we have to take a bus." He said, "Don't scare the party off like you did last time." He said, "You [120] just come with the stuff and we will take everything."

Q. Following that conversation, did you go to Everett?

(Testimony of Henry L. Giordano.)

A. Yes. I went to Everett in the company of District Supervisor Crisler, Agent Goode, Inspector Graben, and Harvey Naylor.

Q. What did you do after you got to Everett?

A. I waited across the street from the Central Building with District Supervisor Crisler, and Inspector Graben, and after a short period of time Mr. Naylor came to the front door of the building and started across the street, and walked across with District Supervisor Crisler and Inspector Graben and went with Mr. Naylor up to the third floor to Mr. Barnett's office. The door was opened by Agent Goode, and I went in with the other officers, and entered the office to the left where Mr. Barnett was sitting in the chair. Mr. Crisler sat down next to him. Mr. Goode had told District Supervisor Crisler—he said, "The sale has been made." Mr. Crisler asked Mr. Barnett what it was all about. Mr. Barnett said, "I was just trying to do a friend a favor and now I have lost my law practice and everything." Mr. Crisler said to Mr. Barnett, "Well, tell me all about it."

In the meantime, I had been examining the narcotic drugs which were on the table in the room, in at [121] cigar box, and one bottle was opened, and the tablets were laying on a piece of tissue paper. I held one of the bottles up and said, "There isn't enough tablets in here; this doesn't compare with this inventory."

Mr. Barnett said, "Well, Harvey Naylor just got some before." We asked what he meant by that

(Testimony of Henry L. Giordano.)

and he said, "Well, when Mr. Goode was counting the tablets, Mr. Naylon poured some of the tablets into his pocket." District Supervisor Crisler instructed Inspector Graben and myself to go and get the tablets from Mr. Naylon, which we did. Mr. Naylon had been waiting in one of the other offices and we went in there and he had left. So we went downstairs and stopped him in the lobby. Inspector Graben searched him and we found an ointment tin containing a quantity of tablets—morphine tablets.

Q. Mr. Giordano, there is on the stand there before you what is identified as Plaintiff's Exhibit Number 1. Will you examine that and tell us what it is?

A. This is the cigar box that was on the desk in Mr. Barnett's office when I went in, after being admitted by Agent Goode. These bottles were all in the box except one. One bottle was out, standing alongside the box, with some of the tablets poured out in a Kleenex. This here ointment tin with the tablets is [122] the one that was recovered by Inspector Graben in my presence.

Q. From Mr.—

A. From Mr. Naylon. They all have my initials on them, where I initialed them at the time.

Q. What was done with that exhibit following the completion of your work there at Everett that evening?

A. It was taken into custody by Inspector Graben and, after it was sealed, brought back to Seattle—and it was sealed. Inspector Graben and I

(Testimony of Henry L. Giordano.)

inventoried it and sealed it and it was transferred to my custody on about the 10th and was kept in the safe in the Narcotic office, room 311; and on about February 17th, I believe, I took it to the United States Chemist, Mr. Ringstrom in the Federal Office Building in Seattle and placed it in his custody.

Q. Following this, you and Mr. Graben out to recover this little can of drugs from Naylor?

A. Yes.

Q. Did you then come back up to the office?

A. Yes, returned to the office with Inspector Graben. We were admitted to the office that time, I believe, by District Supervisor Crisler. I can't recall whether the door was open or he opened the door for us. As we entered, Mr. Crisler said, "Mr. Barnett has told [123] me the whole story and we are making arrangements to bring him before the Commissioner."

He said to Mr. Barnett. "Tell these men the story of what happened and what transpired in connection with these narcotics."

Mr. Barnett said to Inspector Graben and I, "Well, I have a client, a Mr. Macartney in the County Jail whom I have been representing." He said, "Mr. Macartney instructed a man named Douglas to turn over this box of narcotics to me."

He also stated that he had received instructions from Mr. Macartney that Macartney knew an addict in Seattle who could tell Mr. Barnett how to dis-

(Testimony of Henry L. Giordano.)

pose of it or possibly would take the narcotics, and that he saw this addict.

Q. Did he say who he was?

A. He said his name was Harvey Naylor. He said he lived in the Ritz Hotel in Seattle.

I asked him how many times he saw Harvey Naylor—and he stated that he had been to Seattle twice to see him—saw him on only one occasion and that Mr. Naylor had been to Everett to see him on two occasions exclusive of that particular date. I asked him if on one of those occasions he had given Mr. Naylor some opiates. He said, “Yes,” that on the [124 & 125] second occasion he had given Mr. Naylor some cocaine and that on a previous occasion he had given him some morphine tablets.

I then asked him if he had had a telephone conversation with Mr. Naylor on that day and he said, yes, he had. I said, “Well, I know about it. I overheard the conversation.”

I believe about that time we left the office. I am not sure.

Q. Let me direct your attention. Did he say anything about where he had gotten the drugs?

A. Yes. He said he had gotten them from Douglas. We asked about this Douglas and he said Douglas had been in jail up in Everett along with Macartney on a charge of burglary or robbery and that he had gone to Douglas' home which was out of Snohomish,—this was a farm out there—and obtained the box which had been wrapped in paper, from Douglas. I asked him how he happened to go out to get the nar-

(Testimony of Henry L. Giordano.)

coties and he said he had received a telephone call from Douglas, asking where he lived, and saying that he had a box to deliver according to Macartney's instructions. He said the following day, which was a Saturday, he received another telephone call from Douglas, and on this occasion Douglas told him [126] that he couldn't get in to deliver the box and made some excuse that his car was broken down or had trouble. He stated that he asked Douglas where he lived and received instructions from Douglas as to how to get to the farm, and that he drove out to the farm and parked there, Douglas came out to the car and asked if he was Barnett and then went into the house—after Barnett said, yes, I am—went into the house and returned and handed him this box, and he drove back to Everett with the box.

Q. Did he say whether anybody went with him to Snohomish?

A. He said his wife went out with him. [127]

Seattle, Washington, May 12, 1948

9:30 o'Clock, P.M.

HENRY L. GIORDANO

(Resumed.)

Direct Examination—(Continuing)

By Mr. Sager:

Q. Mr. Giordano, what further conversation did you have with the defendant Barnett up there in his office?

(Testimony of Henry L. Giordano.)

The Court: If you did have any further conversations.

A. I asked Mr. Barnett in his office if he didn't realize [129] that he had been violating the law in handling the narcotics and he said he had. I said, "Well, you are an attorney; you should know better." And he said, "Well," he guessed he was just a damned fool in doing it. I don't recall any additional conversation at the office.

Q. Were you there when an arrangement was made to have a Commissioner's Hearing?

A. Yes. I believe I was, yes.

Q. Do you recall what transpired in that connection?

A. Mr. Crisler had advised Mr. Barnett that he would have to be brought before a Commissioner inasmuch as it was Saturday and already all of the offices were closed,—if he knew the Commissioner and could call him at his home or locate him some place and have him come down so that he could be arraigned and a bond set right away, and then he could go ahead and use the telephone, which Mr. Barnett did.

Q. Do you recall what he said over the telephone?

A. Not other than he said that he was in some trouble and wished that the Commissioner would come to his office for,—I don't recall his exact words.

Q. Did you then go to the Commissioner's office?

A. Yes, I did.

Q. With the rest of you who were there? [130]

A. Yes, sir.

Q. What happened there, Mr. Giordano?

(Testimony of Henry L. Giordano.)

A. When we first got into the Commissioner's office, Mr. Crisler introduced himself as a District Supervisor for the Bureau of Narcotics and told Mr. Cooper that he wanted to file a complaint against Mr. Barnett. Mr. Cooper asked Mr. Crisler if he knew what he was doing. Mr. Crisler said, yes, he thought he did. He then said to Mr. Crisler, "You haven't shown me any credentials." He said, "You claim you are with the Narcotics Bureau, but you haven't shown me your credentials."

Mr. Crisler reached into his pocket to get his credentials and found he didn't have them, and asked me to show my credentials to Mr. Cooper, which I did.

The Commissioner asked Mr. Barnett to step out for awhile and talked to us. Then he asked Mr. Barnett to come back into the office.

At that time he had already prepared the complaint. He asked Mr. Barnett, he asked him, "Are these men justified in arresting you?" and Mr. Barnett answered "Yes, they are."

The Commissioner then proceeded with the arraignment, set the bond, and after the arraignment Agent Goode and I took Mr. Barnett to the County Jail.

Q. Was bond later furnished that evening?

A. I don't know.

Q. Do you know whether or not Mr. Barnett was released from jail that evening?

A. He had not been when I left the jail.

Mr. Sager: You may inquire.

(Testimony of Henry L. Giordano.)

Cross-Examination

By Mr. Dailey:

Q. Who was the Commissioner?

A. Mr. Cooper.

Q. When you went up to the office there, there were four or five of you there, weren't there?

A. Mr. Barnett's office?

Q. Yes? A. Yes, sir.

Q. You were all asking him questions at once, weren't you?

A. Not at the same time, no, sir. Mr. Crisler started asking the questions. I didn't ask questions until just prior to the time we left the office.

Q. And all the question you asked him was how he came to get mixed up in this and he said he had just been a damned fool? [132]

A. No. I asked him other questions; when he was relating what had happened, I asked him questions in regards to that.

Q. Well, he told you where he had got it,—that he got it from Douglas, didn't he? A. Yes, sir.

Q. He told you that he went out to Douglas' house because Douglas had called him and said he had a package for Macartney and that his car was broken down, isn't that right?

A. He didn't say he had a package for Macartney. He said he had a package that he was to deliver according to the agreement with Macartney.

Q. Are you sure that he said that?

A. To the best of my recollection that is what he said.

(Testimony of Henry L. Giordano.)

Q. He told you that he had a client, Macartney, in jail who had told Douglas to turn this over to him, and that Douglas had done it, isn't that what he told you? A. Yes, sir.

Q. He told you, then, that he got a call from Douglas and Douglas had a box to deliver according to Macartney's instructions, is that right?

A. Well, yes; that is substantially correct.

Q. Then you say you asked him if he didn't realize he had violated the law? [133] A. Yes, sir.

Q. How did you tell him he had violated the law,—or did you tell?

A. In handling these narcotic drugs.

Q. Do you mean in having possession of them.

A. In handling and the sale of them.

Q. What did you say to him,—what were your exact words?

A. Well, as close as I can remember, my exact words were "Don't you realize you have violated the law in selling these narcotics to Agent Goode, here?"

Q. That is not what you said yesterday, is it?

A. (No response).

Q. Didn't you say yesterday that you had asked him if he realized that he had violated the law and that is all. A. I said that this morning.

Q. When you were talking with the Commissioner, there, you say Barnett was out of the room part of the time? A. Yes, sir.

Q. Did you hear the Commissioner, Mr. Cooper, asking if you men were justified in arresting him?

A. Yes, sir.

(Testimony of Henry L. Giordano.)

Q. Was that after you had told the Commissioner your story and the complaint was made out?

A. Yes, sir.

Q. Had he yet seen the complaint? [134]

A. Mr. Barnett?

Q. Barnett. A. Yes, he had.

Q. He had seen it? A. Yes.

Q. And then the Commissioner asked you if you were justified in arresting him and you said yes?

A. Yes.

Q. You had already arrested him, hadn't you?

A. Yes, sir.

Q. And of course you think you are justified in arresting a man on suspicion, don't you?

A. It all depends on the circumstances.

Q. I am asking you what you think.

A. Well, we are not authorized to arrest someone just on suspicion alone.

Q. You think you are justified, don't you?

A. We have to have more than just suspicion to arrest.

Mr. Dailey: I think that is all.

Mr. Sager: That is all, Mr. Giordano.

The Court: Step down.

(Witness excused.) [135]

* * * *

It Is Hereby Stipulated between the parties hereto that Hugo Ringstrom testified as follows:

That he was a chemist; a graduate of the School of Chemistry of the University of Minnesota, the class of 1915; that he has been engaged in the pro-

fession of chemistry at all times since with exception of two years. That he examined the contents of each individual bottle contained in Exhibit 1, and found them to contain the following:

- 1 bottle containing $188 \frac{1}{2}$ gr. morphine sulphate tablets
- 1 bottle containing $293 \frac{1}{6}$ gr. morphine sulphate tablets
- 1 bottle containing $501 \frac{1}{4}$ gr. morphine sulphate tablets
- 1 bottle containing $85 \frac{1}{8}$ gr. morphine sulphate tablets
- 63 $\frac{1}{2}$ gr. morphine sulphate tablets
- 1 bottle containing 177 gr. powdered opium
- 1 bottle containing $51 \frac{1}{4}$ gr. codeine sulphate tablets
- 1 bottle containing $100 \frac{1}{4}$ gr. codeine phosphate tablets
- 1 bottle containing $100 \frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing $502 \frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing 40 copavin tablets
- 1 bottle containing 100 5-mg. dolophine tablets
- 1 bottle containing 39 copavin capsules
- 1 bottle containing 93 acetidine with codeine phosphate tablets

JEANNE NAYLON

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. State your name, please.

A. Jeanne Naylon—Mrs. Jeanne Naylon.

Q. Are you the wife of Harvey Naylon?

A. Yes, sir.

Q. Do you know Ralph R. Macartney?

A. Yes, sir.

Q. Where did you become acquainted with him, Mrs. Naylon? A. At the Ritz Hotel.

Q. About when?

A. Well, he lived there perhaps two or three months—around the latter part of November and December.

Q. Of what year? A. 1947.

Q. Have you ever met the defendant Garfield Barnett? A. One time.

Q. When was that?

A. Oh, around the middle part of January. [148]

Q. Where was it? A. At the Ritz Hotel.

Q. Will you tell us what occurred on that occasion, Mrs. Naylon?

A. He called up my room and asked for Harvey, and I told him Harvey wasn't there. He said it was Ralph. So I hung up the phone, and I couldn't imagine—I thought he meant Ralph Ma-

(Testimony of Jeanne Naylor.)

cartney, and I couldn't imagine him being there so I called down to the office and they said it was Mr. Barnett.

Mr. Dailey: I object to that, your Honor.

The Court: The objection is sustained. It is stricken and the jury will disregard it.

Mr. Sager: What they told you from the office is not proper.

The Court: That is what the court meant.

The Witness: All right.

A. (Continuing): Well, I went down to the lobby and talked to Mr. Barnett, then.

Q. (By Mr. Sager): Just what conversation did you have with Mr. Barnett?

A. Well, he said Harvey was supposed to have called him the day before that, and he didn't, and he was in Seattle to attend a dinner and he came by to see [149] Harvey, and he said to tell him to call him. Then he said, "I am not after him with an axe but tell him to get in touch with me right away. I made a bargain with him and I expect him to keep his end of it."

Q. Was anything else said?

A. No. He said to call him around 8:30 because he expected to be home then.

Q. 8:30 when? A. That evening.

Q. Did he say where he was to call him?

A. At his home.

Q. Did he tell you who he was?

A. Yes. He said it was Mr. Barnett.

(Testimony of Jeanne Naylor.)

Q. Was that all? A. Yes, sir.

Mr. Sager: You may inquire.

Cross-Examination

By Mr. Dailey:

Q. What time of day was it that he saw you?

A. Well, it must have been before 4:00 o'clock. The day clerk goes on at 4:00, and she was still there. It was some time in the early afternoon, I believe. It [150] could have been around noon but I don't believe so—it was in the early afternoon.

Q. Did you ask him what the bargain was that he had made with Barnett? A. No.

Q. You didn't ask him any questions about it?

A. No. He said Harvey had made a bargain with him and he expected him to keep it.

Q. He just said he didn't want him to call?

A. Yes.

Q. Then he said he was not after him with an axe but wanted to see him right away?

A. Yes.

Q. That he had made a bargain with him which he expected Mr. Barnett to keep?

A. Yes, sir.

Q. You don't know anything about what that bargain was?

A. No. He didn't discuss that at all.

Q. Are you a user of narcotics?

A. No, sir.

Q. Never have been? A. No.

(Testimony of Jeanne Naylor.)

Q. On this day in question had you been drinking? A. No.

Q. Do you drink? [151]

A. Not very much. I drink beer once in a while.

Q. As a matter of fact, you and your husband met Macartney on parties there at the Ritz, did you not? A. No, sir.

Q. You did know that Macartney and Harvey were pretty good friends, didn't you?

A. No. He just was an acquaintance. We would just see him there at the hotel?

Q. Didn't you party together?

A. Never. We were never on a party together.

Mr. Dailey: That is all.

Mr. Sager: That is all, Mrs. Naylor.

The Court: You may be excused, Mrs. Naylor.

(Witness excused.) [152]

WALTER G. GRABEN

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you state your name, please?

A. Walter G. Graben.

Q. And your occupation?

A. I am a Narcotic Inspector with the Bureau of Narcotics, stationed in Seattle, Washington.

(Testimony of Walter G. Graben.)

Q. How long have you been with the Bureau of Narcotics, Mr. Graben?

A. Twenty-four years.

Q. Mr. Graben, are you familiar with the price of narcotic drugs on the illicit market?

A. Yes, I am.

Q. I mean the price between peddlers and dope addicts? A. Yes.

Q. What is the price or what is the range of price?

A. Morphine sulphate, a quarter grain tablet sells all of the way from \$3.00 to \$5.00, depending on how available it happens to be at the time. The one-half grain tablets sell for quite a little more—perhaps [153] from \$4 to all the way from \$6, \$7, or \$8, also depending on the availability.

Q. Does that price vary depending upon the quantity sold or purchased?

A. Yes. If there is a shortage, they perhaps would get a little higher than they would otherwise.

Q. I mean in buying large quantities in a particular purchase, would the price be different?

A. Yes. You would buy a larger quantity with a reduction, of course.

Q. Do you know the defendant, Mr. Barnett?

A. Yes, I do.

Q. When did you first meet him?

A. On February 7th, this year.

Q. Where?

(Testimony of Walter G. Graben.)

A. In Everett, Washington, in his office in I believe it is the Central Building.

Q. Will you tell us what previous circumstances led up to your going to Everett on that occasion?

A. I left our office in this building with District Supervisor Crisler and Narcotic Agents Goode and Giordano.

Q. Well, prior to that? A. Prior to that?

Q. Yes. Were you at the office when Mr. Naylor was there? [154]

A. I was there when he was there, yes, but I was not there when any telephone conversation was made.

Q. All right. Then you went up to Everett with the other agents? A. After a call, yes.

Q. After you got to Everett, tell us what you did?

A. We waited across the street from Mr. Barnett's—

Q. Who?

A. Narcotic Agent Giordano and I and District Supervisor Crisler waited in a cafe, I believe it was, across the street from the building in which Mr. Barnett has his office. We saw Harvey Naylor and Narcotic Agent Goode enter the building. In a short time Harvey Naylor came across the street to where we were, at which time District Supervisor Crisler and Agent Giordano and I entered the building and went to the office of Mr. Barnett in the building.

(Testimony of Walter G. Graben.)

When we entered the office, Mr. Barnett and Narcotic Agent Goode were seated in his office and directly in front of them on a desk there was a considerable number of bottles of various narcotic drugs in bottles such as are used in drug stores.

Q. The bailiff is handing you Plaintiff's Exhibit Number 1, Mr. Graben. Will you examine that and state what it is? [155]

A. This is the box—a Van Dyke cigar box—containing the various drugs which were just referred to as being on the table in the room in which Mr. Barnett and Narcotic Agent Goode were seated in Everett on February 7th.

Q. At that time, were any of these tablets out of the bottle?

A. Yes. The bottle containing the morphine sulphate, one-half grain tablets was out on the —separated from the rest of them and there was a Kleenex on the desk and a quantity of tablets lying out on the Kleenex, and the remainder in the bottle.

Q. Then go ahead and tell us from there what happened, Mr. Graben.

A. Mr. Crisler questioned Mr. Barnett in our presence about these drugs, and asked him what had transpired. Mr. Barnett told him, in answer, that he was just trying to help out a friend. I believe he used the word "friend" or someone. He was asked, then, where he obtained these drugs. He stated, then, that he had a client in the Snohomish County Jail—referred to him as Macartney—who

(Testimony of Walter G. Graben.)

had told him that he had a friend who had been in jail with him in the Snohomish County Jail, who had a quantity of drugs and that he had directed that man, whom he called Douglas, to turn [156] the box of narcotics over to him—Mr. Barnett. And he stated that subsequent to that he had received one or possibly two calls from this man referred to as Douglas, and there was some conversation that Douglas wasn't able to bring the box of drugs in and turn them over to him as had been arranged with Macartney, and so——

Q. Wait a minute.

A. Mr. Macartney, he drove out to the place where Douglas was staying, some distance out of there toward Snohomish, at which time Douglas turned over to him this box of drugs, which he had had Barnett—Mr. Barnett had had in his possession at that time.

He set the date upon which he obtained the drugs upon being asked that question as approximately January 17th, because he said, that Douglas was released on bond from the Snohomish County jail on the 16th, and it was shortly after that. He was also told, then, that it was very apparent that these drugs were from a drug store stock. It was also stated at that time that very possibly they were from a local drug store in Everett which had been burglarized previously on the night of December 24th—the Bayview Drug.

Because of the fact that an inventory of the

(Testimony of Walter G. Graben.)

drugs, which we had in our possession, the Bay-view loss filed on an affidavit seemed to show a large number——

Mr. Dailey: I object to this, your Honor, as something which is wholly without the issues of any information that they had unless he testified that somebody imparted that knowledge to the defendant.

The Court: Does that involve the same question that you raised yesterday as to one witness testifying as to conversations had out of the presence of the defendant?

Mr. Dailey: Yes, your Honor.

The Court: If counsel would like the court to do so, to give the cautionary instruction which I usually give in these cases on that point——

Mr. Dailey: I think your Honor should.

Mr. Sager: If the Court please, this doesn't involve any conversation with anybody else outside of the presence of the defendant. He is telling him now what transpired in the defendant's office.

Mr. Dailey: That is not my understanding, your Honor.

The Court: Then establish the fact, if it is a fact, by counsel examining. [158]

The objection is overruled.

Q. (By Mr. Sager): Mr. Graben, I don't want you to state anything that you learned from other sources. Just tell us what happened, what you were

(Testimony of Walter G. Graben.)

doing, and what was said there in the presence of Mr. Barnett in his office.

A. It was suggested that there were fewer morphine sulphate one-half grain tablets in that bottle than should be there, and Mr. Barnett was asked what happened to the rest of the tablets, whereupon he said that Harvey took some of them.

We said, "When was that?" And he said, "Well, when they were on the table there, when Agent Goode was there, Harvey put some of them in his coat pocket."

Mr. Crisler then immediately told Harry Giordano and I to go to Harvey and see if he had the tablets.

We went into the *adjoining where* he had been seated and he was not there. He had just gone through the door, apparently, and we went downstairs and he was just then down in the entrance to the building. I asked him if he had——

Q. You can't relate that conversation? [159]

A. I see. At that time he had on his person an ointment box containing—I think there were approximately sixty-one morphine tablets, one-half grain, which he turned over to me. We then returned to the office of Mr. Barnett.

Q. Is that ointment box in this exhibit?

A. Yes.

The Court: "In this exhibit"—is that included as a part of Plaintiff's Exhibit 1, Mr. Witness, which is already in evidence?

(Testimony of Walter G. Graben.)

The Witness: It is, yes.

A. (Continuing): We returned to Mr. Barnett's office and shortly thereafter—after some arrangements had been made with Mr. Crisler and Mr. Barnett relative to the filing of a complaint and the obtaining of the presence of a United States Commissioner for arraignment—we went to the office of the United States Commissioner in Everett.

Q. (By Mr. Sager): Before you go further there, Mr. Graben, do you recall whether or not anything was said in your conversation with Mr. Barnett with respect to seeing Naylor?

A. Yes. Mr. Barnett stated that he had made several [160] trips to Seattle, that he was asked, "How did you happen to know Naylor?" and he said that he didn't know him, but that Macartney knew him, and Macartney had told him that if he would go to Seattle and look up Naylor in the Ritz Hotel, that he could negotiate for the disposition of these drugs with Naylor.

He made, I believe, two trips to Seattle and he stated he contacted Naylor on one occasion, but on the other occasion he couldn't locate him. He also stated that Naylor had been in his office on two occasions, I believe, at which time the drugs and their disposition was discussed, and that on one occasion he gave Naylor a sample of some cocaine.

Q. Did he say anything concerning the price of the drugs or their value? A. Yes.

('Testimony of Walter G. Graben.)

Mr. Dailey: If the Court please, I think that is leading and I object to it for that reason.

The Court: The objection is sustained. Exhaust the witness' recollection first, please.

Q. (By Mr. Sager): Do you recall anything further that was said by Mr. Barnett during that conversation—about his transactions with either of these men?

A. The matter of price—there was some conversation; [161] I don't recall just what it was. I may have been in the other office just then. But there was some conversation there about the sum of money which the drugs would—the value of the drugs.

Q. Was that conversation with Mr. Barnett?

A. Yes.

Q. Was there any sum named?

A. A sum, yes—the sum of supposedly \$10,000 for the lump sum of drugs was what the negotiations were for, with Narcotic Agent Goode.

Q. Do you recall any other conversation there at that time, Mr. Graben?

A. Just at the moment I don't recall any other conversation. No, I don't recall.

Q. Do you recall whether he stated where he got the box of drugs?

Mr. Dailey: I think that has already been gone into, if your Honor please.

Mr. Sager: If it has, I don't want to repeat it.

The Court: The witness related the conversation

(Testimony of Walter G. Graben.)

with Mr. Barnett which concerned two named persons.

The Witness: Yes.

A. (Continuing): He drove out to Douglas' place— [162] out toward Snohomish. I thought I stated——

Q. (By Mr. Sager): Did you already testify to that?

A. I did—that it contained a box of drugs.

Q. Following this conversation in his office, did you go to the Commissioner's office?

A. Yes, I did.

Q. Tell us what occurred there?

A. The Commissioner discussed the matter of arraignment and this Complaint quite a bit with District Supervisor Crisler and asked him what about the circumstances in connection with it. Then after considerable discussion of the matter—Mr. Barnett was out of the office for a while, while it was being discussed with us, and when Mr. Barnett returned into the Commissioner's office, he was asked by the Commissioner—Mr. Barnett was asked by the Commissioner whether the officers were justified in making this arrest and he said that they were. That is about all that I can recall of the Commissioner's arraignment.

Q. Where did you go from the Commissioner's office?

A. I had this exhibit, containing the drugs, which were in the possession of Mr. Barnett. I

(Testimony of Walter G. Graben.)

took possession of this box of drugs, and I went to the Bayside Drug in Everett. [163]

Mr. Dailey: I object to that, if your Honor, as wholly beyond the issues here—what he did at the Bayside Drug.

The Court: Upon what material issue does this inquiry bear?

Mr. Sager: I want to show the source of the drugs.

Mr. Dailey: That is not the proper way, if your Honor please. I don't think that is material.

Mr. Sager: I am not asking for any conversation; I am merely asking what he did.

The Court: Is this after the arrest?

Mr. Dailey: This is after the arrest, your Honor.

The Court: The objection is sustained.

Q. (By Mr. Sager): Did you keep these drugs, then, in your possession following that, Mr. Graben?
A. Yes.

Q. What did you do to them?

A. Following the arrest, we came to our office in the building and these drugs were placed in the safe in our vault.

Q. Following that, what happened?

A. Following that, on the 10th of the month of February, [164] 1948, they were placed in a government wrapping, with a government evidence envelope attached, and prepared for transmittal to

(Testimony of Walter G. Graben.)

the chemist. And they were later on transmitted to the chemist by Narcotic Agent Giordano.

Mr. Sager: You may inquire.

Cross-Examination

By Mr. Dailey:

Q. You didn't go up to the office at all; each one of you three remained in the cafe there until after Naylor came down, is that right?

A. Yes, that is right.

Q. What cafe were you in?

A. I don't remember the name. I didn't look at the name.

Q. Where is it with reference to the Central Building?

A. Across the street on the corner.

Q. That would be across the main street to the north?

A. Yes.

Q. Would you recognize the name as the Recreation?

A. I wouldn't recognize the name.

Q. It is across the street—Rockefeller Street—isn't it?

A. Yes.

Q. Just toward the north, isn't it? [165]

A. It is toward Seattle.

Q. I am sorry. I should have said south. I did say north. It is directly south?

A. Yes.

Q. When you went up there, Crisler was talking to him?

A. Yes.

Q. Who else was taking part in that conversation?

(Testimony of Walter G. Graben.)

A. Narcotic Agent Giordano, and I think Agent Goode.

Q. All of them but you were talking with Mr. Barnett?

A. I had perhaps some conversation with him, yes.

Q. Who made the statement about any sum of \$10,000?

A. Who made the statement?

Q. Yes?

A. Barnett made the statement. It had previously been discussed with Narcotic Agent Goode.

Q. Did you hear the conversation immediately before that or immediately after?

A. I didn't hear Agent Goode's conversation. I was there, though, when the sum of \$10,000 as the value of the drugs was stated by Mr. Barnett.

Q. Was that in answer to a question by Mr. Goode?

A. I don't know who put the question to him.

Q. And you don't know what the question was?

A. Yes; the matter of the sale of the drugs and the price was discussed, naturally. [166]

Q. But tell us the words that were used.

A. I don't recall the exact words.

Q. You don't recall whether someone asked, "Did you have an offer" or something of that kind.

A. I knew he had an offer.

Q. I am not asking you anything about what you knew, Officer. You realize the question I am asking you, here, is the question that was asked

(Testimony of Walter G. Graben.)

him, in which he answered something about \$10,000?

A. Yes, he was asked by either Mr. Crisler or Agent Goode—he was reminded or referred to the price of \$10,000. I don't just exactly remember the words that were put there, but that was—subsequent, it would only be natural that he would be asked that because he had just negotiated the sale.

Q. I am not asking you that at all. I am asking you to try to remember the words that were asked him.

A. I do not remember the exact words, but he was questioned relative to the narcotics in this box where the proposed sum of \$10,000 or \$8,000 was mentioned to Agent Goode.

Q. What was it—ten or eight?

A. I don't recall.

Q. Was it Goode or Crisler that asked him that?

A. I don't recall which one asked him. [167]

Q. Where was Graben at the time?

A. At the time of—

Q. At the time this talk took place.

A. This talk?

Q. Yes. A. I presume Naylor—

Q. Do you know where he was?

A. Well, after we took the tablets from him downstairs, he took the bus back to Seattle.

Q. He took the bus back? A. Yes.

Q. He didn't wait to come back with you folks at all? A. No, he did not.

Q. In other words, after you took these tablets out of his pocket, he left? A. He left.

(Testimony of Walter G. Graben.)

Q. You knew, of course, that he had accused Barnett of trying to sell these drugs to him, did you not?

A. That he had accused him?

Q. Yes. And you knew that that was the accusation that Mr. Crisler was making to the Commissioner, didn't you? A. That he had—

Q. That he was charging you with attempting to sell drugs.

A. I think he was charged with the sale—not attempting to sell them. [168]

Q. You knew he was being charged with the sale of drugs? A. Yes.

Q. And that is when he said to the Commissioner, "You are justified in filing the charge"?

A. Yes.

Mr. Dailey: That is all.

Mr. Sager: That is all.

The Court: Step down.

(Witness excused.) [169]

LEONARD A. DOUGLAS,

called as a witness by and on behalf of the plaintiff, having been first duly sworn, was examined and testified as follows:

Direct Examination

By Mr. Sager:

Q. Will you tell us your name?

A. Leonard Douglas. [176]

(Testimony of Leonard A. Douglas.)

The Court: Do you have a middle initial?

The Witness: Leonard A. Douglas.

Q. (By Mr. Sager): Mr. Douglas, are you one of the defendants named in the indictment in matter?

A. Yes, sir.

Q. Do you know the defendant Ralph R. Macartney? A. Yes.

Q. Where did you become acquainted with him?

A. In the County Jail in Everett.

Q. About when?

A. Well, it was around the 6th of January.

Q. Of this year? A. Yes.

Q. Do you know the defendant, Mr. Barnett?

A. Not very well.

Q. Have you ever seen him before?

A. Not until that night he came out to the place.

Q. Well, you have seen him before?

A. That was the first time.

Q. There is placed before you what is Plaintiff's Exhibit 1 in this case, Mr. Douglas. Will you examine that and tell us if you have ever seen it before? A. Yes.

Q. Where did you get those bottles? [177]

A. At the Bayside Pharmacy in Everett.

Q. When?

A. That was the morning of the 25th of December, 1947.

Q. How did you get in?

A. Burglary, broke in.

Q. What did you do with those drugs following that?

(Testimony of Leonard A. Douglas.)

A. Well, I took them to my home and from there I took them up to North Bend. Then I brought them back and turned them over to Mr. Barnett.

Q. Where is your home?

A. Route 2, Snohomish.

Q. Before you turned them over to Mr. Barnett, did you have a conversation with Ralph Macartney concerning them?

A. Yes, I did.

Q. Where was that?

A. That was in the County Jail, Everett.

Q. About when?

A. It wouldd be about the 14th or 15th of January.

Q. How long were you in the County Jail at that time, Mr. Douglas?

A. Ten days.

Q. Do you recall what dates they were?

A. Well, it was from the 6th until about the 16th.

Q. What conversation did you have with Macartney concerning these drugs? [178]

A. I object to that, if Your Honor please, unless it be in the presence of this defendant.

The Court: What is the theory of admissibility asserted by counsel examining?

Mr. Sager: The same as in tthe case of Mr. Macartney, Your Honor. It is part of the conspiracy alleged in the second count, and the act of one conspirator is the act of another. There is evidence now which connects with Barnett as to the conspiracy.

(Testimony of Leonard A. Douglas.)

The Court: Does anyone connected with the case think that the court ought to at this time give the cautionary instruction which has been mentioned by the court previously?

Mr. Dailey: Most certainly, Your Honor. I renew my objection that I don't think there is any allegation which connects the defendant. A conversation between Macartney and this witness couldn't affect him.

The Court: The court overrules that objection and in connection with this question and in connection with a similar question asked Mr. Macartney yesterday, when that witness was on the stand and in effect to which a similar question was asked of that witness, counsel for the defendant, Mr. Dailey, excepted, the court gives to the jury the following cautionary [179] instruction:

You are instructed on the question of whether the alleged conspiracy existed as charged in Count 2 of the Indictment, you are not to consider any statements made or acts done by any defendant in furtherance of the alleged conspiracy in the absence of other defendants except against the individual making the statements or doing the acts unless you are convinced by the evidence beyond a reasonable doubt that the defendant so making such statements or doing such acts was authorized by another or other of the defendants to make those statements or do those acts in furtherance of the alleged conspiracy; and in such cases you will consider such evidence only against the defendant actually making

(Testimony of Leonard A. Douglas.)

the statements or doing the acts, and such other, and only such other defendants as you shall be convinced by the evidence beyond a reasonable doubt—if you are so convinced—authorized the making of such statements or the doing of such acts.

You will consider that cautionary instruction at all stages of this trial, and this instruction will be repeated to you as a part of all the instructions on the law to be given to you by the court later, and should be considered along with all of the other [180] instructions to be so given to you by the court.

Mr. Dailey: For the record, I take exception to that, if Your Honor please, upon the further ground that the instruction would not correct an error that might be allowed in the court because of this: this defendant, so-called, is not a defendant in this action, so that that instruction doesn't actually apply it seems to me. If he and Macartney were defendants in this action, it would be proper, I think, but in this case they are not defendants at all; therefore, no instruction could be put on it except the defendant who is here on trial.

The Court: The court rules that although the other two defendants, Macartney and Douglas, are not on trial at this time, that they are nevertheless named as alleged conspirators with this defendant who is on trial with respect to Count 2 in the indictment, and as to that count the objection to this evidence is overruled.

The jury is further instructed that you may not consider this question and this line of evidence now

(Testimony of Leonard A. Douglas.)

objected to so far as concerns the allegations in Count 1. You may not consider it as to the charges in Count 1. You may consider it under the conditions stated by the court only in [181] connection with Count 2—the so-called conspiracy count.

Mr. Dailey: Let the record show our exception?

The Court: The exception is allowed to the Court's ruling, overruling the objections.

Read the question to the witness.

(Last question repeated by the reporter.)

A. Well, we just got to talking about narcotics. I told him where I could get some. He knew where to get rid of them, and he said he would have—

The Court: Do not state anything except what he said and what you said.

A. (Continuing) He just said he would see his lawyer, and have him look up a fellow in Seattle and see them. He was a user.

Q. (By Mr. Sager): Did he say who this fellow was he was to see in Seattle?

A. Harvey Naylor.

Q. Did he tell you anything about Harvey Naylor?

A. No; just that he was a user and that was all.

Q. Did you tell him how much you had of these narcotics?

A. Well, approximately—I don't know just how much I had for sure, myself. [182]

Q. Did you make any statement to Macartney about the quantity?

(Testimony of Leonard A. Douglas.)

A. Well, it was around 800 grains of morphine, I know, and some cocaine.

Q. Did you have any further conversations with Macartney concerning it?

A. Just the way the money was going to be split is all.

Q. What was that?

A. Just the way the money was going to be split is all.

Mr. Dailey: I object, Your Honor.

The Court: The objection is overruled. The jury is directed to receive this evidence as previously indicated as concerns only Count 2 and not as having any bearing on Count 1.

The Court again instructs you not to consider it in connection with the charges in Count 1, but only under the conditions stated as to Count 2.

Q. (By Mr. Sager): You may proceed, Mr. Douglas. What was the conversation as to splitting it?

A. Oh, just three ways. Barnett was supposed to take his attorney's fees out of Macartney's share.

Q. Did you discuss with Macartney the value of this or what it ought to be sold for?

A. Oh, we figured around six or seven— [183]

The Court: Just answer yes or no.

A. (Continuing): Yes.

Q. (By Mr. Sager): What was that price?

A. Around six thousand dollars or seven thousand.

(Testimony of Leonard A. Douglas.)

Q. What did you say and what did Macartney say, as you recall?

A. Well, that is about all there was—just that it would come to around six thousand dollars or seven thousand dollars.

Q. How did you arrive at that sum?

A. Just figuring what we had and then what the price of it was.

Q. Was there any discussion about the price?

A. No.

Q. Was there anything said about what it should be worth per grain?

Mr. Dailey: I object to that as leading, if Your Honor please. I don't think that is proper.

The Court: The court thinks that counsel examining ought to make clear, before asking a leading question, at least that the witness' recollection as to details has been exhausted. The objection is sustained.

Mr. Sager: I am trying to direct his [184] attention to a particular phase of the conversation, Your Honor, and I don't know of any other way of doing it.

The Court: The ruling will stand.

Q. (By Mr. Sager): Have you told what you recall of that conversation, Mr. Douglas?

A. Well, he said something about \$10 a grain.

Q. Who said that? A. Macartney.

Q. You got out of jail when?

A. It was around the 16th of January.

(Testimony of Leonard A. Douglas.)

Q. What did you do following that with respect to this box of drugs?

A. Well, I went up to North Bend and got it and brought it back, and turned it over to Barnett.

Q. Did you do anything before turning it over to Barnett?

A. I just called him and told him I couldn't get it.

Q. Did you call him more than once?

A. Yes. I called him on a Friday night and then on a Saturday night.

Q. What were those conversations—what was the first conversation?

A. Well, I told him I had it, and I would try to get it in that night, but I couldn't make it. It was too foggy, and I didn't want to take a chance on driving [185] that far.

Q. What did he say when you told him?

A. He said, "All right."

Q. Where were you to meet him—or where were you to take him?

A. I was going to take it to his house.

Q. Did you know where it was?

A. Well, I looked the address up, yes.

Q. You say you weren't able to get in that night?

A. No, I wasn't able.

Q. Then what happened the next day?

A. The next day I had car trouble and I couldn't make it.

Q. So what did you do?

A. I called him up and told him.

(Testimony of Leonard A. Douglas.)

Q. What did you tell him?

A. I said I had a little car trouble and couldn't get in.

Q. What did he say?

A. He said he would come out and pick them up.

Q. Was anything else said on that second conversation?

A. He just asked the directions to the place and I told him.

Q. Following that conversation, what happened?

A. Well, he come out about a quarter of eight and pulled into the yard. I went out and found that it was Barnett, for sure, and then I went back and got the [186] narcotics and turned them over to him.

Q. What did you say?

A. Well, he said—I handed them to him and told him that they were there. He said—well, that he would see me in a couple of days at the “San.”

Q. He said what?

A. He would see me in a couple of days up at the hospital.

Q. Was there anything else said about them at that time? A. No.

Q. Did you ask him anything concerning them?

A. No.

Q. Was there anything said about when or how he was to dispose of them? A. No.

Q. Is that the last time you saw Mr. Barnett?

A. That is the first and last time.

Q. Where are you presently confined, Mr.

(Testimony of Leonard A. Douglas.)

Douglas? A. In the penitentiary.

Q. Is that on a conviction and for what?

A. The Bayside Pharmacy.

Q. For the burglary of these drugs?

A. Yes.

Q. When were you arrested on that charge?

A. Well, on this charge it was—

Q. I don't mean on this charge here in court—but on [187] the burglary charge of the Bayside Pharmacy.

A. That was during February—just the date I forget.

Q. Was it following your delivery of the drugs to Mr. Barnett?

A. Yes, it was right after he got them.

Q. The ten days you were in jail before, what was that for?

A. That was for burglary of a garage in Snohomish.

Q. That wasn't this one? A. No.

Q. What was the sentence in that first case?

A. Well, it was eighteen months in Monroe and it was suspended.

Q. Suspended on the condition that you do what?

A. Well, I went to the hospital.

Q. What is your physical condition, Mr. Douglas? A. I have tuberculosis.

Q. How long have you had that?

A. Since 1940.

(Testimony of Leonard A. Douglas.)

Q. Since you have been at Walla Walla, have you been in the hospital there?

A. Yes; all of the time.

Q. You have pled guilty to the conspiracy charge in this case, have you? A. Yes. [188]

Mr. Sager: You may inquire.

Cross Examination

By Mr. Dailey:

Q. When you first talked to Macartney about it, where were you confined?

A. In the County Jail in Everett.

Q. Were you in the same cell?

A. In the tank, yes.

Q. Macartney is the one who told you, then, that the stuff could be sold and disposed of advantageously? A. Yes.

Q. He said that he knew of a man who would dispose of it for him? A. Yes.

Q. And that that man—that would be Naylor—and you and he would split it three ways except that Barnett would get his fees out of his, Macartney's share, is that right?

A. It was to be sold to Harvey Naylor; Barnett would sell it.

Q. I see. He told you Barnett would sell it. He never had spoken to Barnett about it in his life, had he?

A. That was after he talked to Barnett.

Q. How do you know it was? [189]

A. He said he would see Barnett.

Q. He said what?

(Testimony of Leonard A. Douglas.)

A. He said that he would talk to Barnett.

Q. He said that he would talk to Barnett. And that he knew someone who would dispose of it, is that right?

A. He said he knew a fellow in Seattle, and he would talk to Barnett to see about having Barnett sell it to this Harvey Naylor.

Q. Didn't you say, a little while ago, that he would have his lawyer look up Harvey Naylor and Naylor would sell it and you would split it three ways, isn't that what you said?

A. No.

Q. Well, isn't that what you agreed?

A. Macartney and I and Barnett would split it.

Q. What?

A. Barnett would sell it to Naylor.

Q. I see. But Barnett was not there when that was said to you? A. No.

Q. He took no part in any of that conversation at all? A. Macartney had talked to him.

Q. You never had talked to Barnett in your life, had you? A. No.

Q. And this night you called him up, you said you had a [190] package from Macartney, didn't you? A. Yes.

Q. And asked if you could leave it with him, isn't that right?

A. He knew that he was to get—

Q. Now, I am not asking you what he knew. I am asking you what he said to him. You called

(Testimony of Leonard A. Douglas.)

him and told him you had a package for Macartney, didn't you? A. Yes.

Q. And asked him if you could bring it in, isn't that right? A. I told him I would bring it in.

Q. You told him that you had a package from Macartney and you would bring it in.

Now, that was the first conversation that you had.

A. Yes.

Q. Now, did you call him that same night and tell him you couldn't make it in, or, did you call him the next night?

A. It was either—I called him twice, yes.

Q. All right. You didn't call him again, then, that first night, did you; you just didn't go, was that it?

A. I may have called him and told him I couldn't make it. [191]

Q. At any rate, you called him again Saturday and said you couldn't get in the night before and that your car was now broken down and asked him if he would come up and get that package, didn't you?

A. I told him my car was broken down and he said he would come out and pick it up.

Q. You told him you couldn't deliver the package because your car was broken down, didn't you?

A. Yes.

Q. And he said he would come out and pick it up? A. Yes.

Q. And you told him where to come?

A. Yes.

Q. And he came up? A. Yes.

(Testimony of Leonard A. Douglas.)

Q. And his wife came with him, didn't she?

A. I am not sure.

Q. Don't you know? You went out to the car and talked to him, didn't you?

A. Yes, but it was after dark and who was in the car with him, I do not know.

Q. Was someone in the car with him?

A. Someone was, yes.

Q. A woman or a man?

A. I wouldn't say for sure. [192]

Q. You were right there alongside of the car, weren't you? A. Yes.

Q. And you talked with him a minute and asked him if he was Barnett? A. Yes.

Q. And then said that you would go and get that package for Macartney, and went and got it, didn't you?

A. I told him I would go and get that package for him.

Q. You told him, then, when you brought it back, that it was a package for Macartney, didn't you? A. It was a package of narcotics, yes.

Q. What?

A. I told him it was a package of narcotics.

Q. You told him it was a package of narcotics at that time? Are you sure you did?

A. I am pretty sure, yes.

Q. Pretty sure. You pled guilty to the conspiracy charge here? A. Yes.

Q. And yet you only had these two talks with anybody concerning this, is that right?

(Testimony of Leonard A. Douglas.)

A. I talked to Macartney, yes.

Q. You never talked to Macartney again, did you?

A. Not after I was out of jail, no. [193]

Q. Then you never talked to Barnett again?

A. No.

Q. When was it you were arrested, then, and charged with stealing this from the Bayside Pharmacy?

A. Well, shortly after Barnett was arrested.

Q. How long after?

A. I was arrested the following Monday.

Q. You were already in jail the first time on a burglary charge for which you got a suspended sentence, provided you would go to the sanitarium?

A. Yes.

Q. And then you went back and pled guilty to robbery of the Bayside Pharmacy, and you are now in Walla Walla? A. Yes.

Mr. Dailey: That is all.

Mr. Sager: That is all, Mr. Douglas.

The Court: Step down.

(Witness excused.) [194]

Mr. Dailey: At this time, if Your Honor please, at the close of the Government's case on behalf of the defendant, I move the court for a judgment of acquittal as to Count 1 on the grounds of failure of proof. [197]

Mr. Dailey: Further, if Your Honor please, I wish to renew the motion on the further and sepa-

rate ground that they have offered no proof here that there was any illegal sale. [217]

The Court: I have answered that the law imposes that necessity. It does not remain a matter necessarily to be established by proof. The law establishes the requirement. That motion is denied.

COURT'S INSTRUCTIONS TO THE JURY

The Court: Members of the Jury, you have heard the testimony and the arguments of counsel. After the court instructs you, you will retire [323] to the jury room to consider your verdict. There is here involved an indictment containing two counts, naming three defendants, but you are concerned on this trial with the guilt or innocence of only one defendant, namely, the Defendant Garfield C. Barnett and no one else.

Although charged in the indictment with Barnett, the other defendants, Ralph R. Macartney Jr., and Leonard A. Douglas are not on trial before you, and the fact they are not has no bearing on the guilt or innocence of the defendant Barnett, and you will not permit the fact that Defendants Macartney Jr., and Douglas are not now on trial to influence you in determining the guilt of innocence of the Defendant Barnett as to the charges in each of these two counts of the indictment.

So far as the guilt or innocence of the Defendant Barnett is concerned, you will likewise disregard all statements of plaintiff's counsel concerning the fact that the defendants Macartney, Jr., and Douglas

are not being tried, or the reason why they are not being tried before this jury.

Throughout these instructions, the court when using the word "Defendant" intends to infer to Defendant Garfield C. Barnett unless the context [324] in particular instances requires a different meaning.

In this case there is one defendant, Garfield C. Barnett, on trial before you on the two counts of the indictment. To the indictment, and to each of the counts thereof, that defendant has entered a plea of Not Guilty. This plea puts in issue every material allegation of the indictment on which the defendant is being tried and casts on the government the burden of proving the guilt of the defendant on trial by the evidence beyond a reasonable doubt. The defendant is not called upon to disprove the charges of the indictment nor to prove his innocence. The indictment is merely the paper charge and formal accusation against the defendant which he has had no opportunity to answer until this trial. And the indictment is not to be considered by you as evidence in any sense against the defendant; and the fact that the indictment has been returned by the grand jury is not to be considered by you in any way as evidence against the defendant of the truth of what it states. The burden is always on the government to prove the defendant guilty by competent evidence beyond a reasonable doubt, [325] and that burden must be successfully met by the government before you can convict the defendant.

In this case you must consider separately each count of the indictment upon which the defendant is being tried. You must decide the guilt or innocence of the defendant as to each count separately, and if you have a reasonable doubt as to any material allegation of the particular count or counts of the indictment you are considering, it is your duty to acquit the defendant as to such count or counts. But if you have no such reasonable doubt concerning any such allegation, it is your duty to convict the defendant on each count as to which under the evidence you have no such reasonable doubt.

The defendant on trial, as well as every defendant in a criminal case, is presumed innocent of the charges contained in the indictment until he is proved guilty of the evidence beyond a reasonable doubt; and this presumption is one of his important rights, not to be ignored or lightly considered either by the court or by the jury. It is one of the important rights which the law accords all persons accused of crime. It attaches to them and continues with them throughout all [326] stages of the trial and throughout all stages of your deliberations until it has been overcome by the competent evidence in the case and until the guilt of a particular defendant has been established by the evidence beyond a reasonable doubt, notwithstanding the presumption of innocence with which the law clothes all accused persons. This applies to the defendant on trial here.

By the expression "reasonable doubt" is meant in law just what those words in their ordinary and

every-day use imply. They have no technical or legal meaning different from their ordinary meaning. A reasonable doubt is a doubt which is based upon reason or is a doubt that is not unreasonable, and not merely imaginary or caprecious. It is such a doubt as if entertained by a person of ordinary prudence, sensibility and decision, he would allow to influence him in transacting the graver or more important affairs of life, causing him to hesitate before acting thereon. It must be a real and substantial doubt, and it must arise out of the honest-minded, conscientious consideration and application of the evidence in the case, or from lack of evidence in the case. [327]

If from a fair and candid consideration of all of the evidence, you can say upon your oaths as jurors that you have an abiding conviction of the truth of the charge to a moral certainty, then you have no reasonable doubt and should convict. If you have no such moral convictions or if you entertain doubts for which sane and satisfactory reasons can be assigned in your own minds, then you must give the defendant the benefit of that doubt and find him not guilty.

You are instructed that while a defendant at the beginning of the trial is presumed to be innocent, yet if and when during your deliberations the proof shows his guilt beyond a reasonable doubt, then the presumption of innocence disappears from the case.

Even though the evidence in this case should engender in your minds a strong suspicion of the probability of guilt of the accused, this the defend-

ant cannot be convicted unless you are satisfied beyond a reasonable doubt of his guilt.

In considering the evidence, I charge you that it is not sufficient for you to find merely that the evidence adduced is consistent with the theory of the defendant's guilt, but before you can find him guilty you must believe beyond a reasonable [328] doubt that the evidence is inconsistent with his innocence and inconsistent with every other reasonable hypothesis except that of guilt.

If the testimony in this case, in its weight and effect, be such that two conclusions can be reasonably drawn from it, one favoring the defendant's innocence and the other tending to establish his guilt, then you should give the benefit of such doubt to the defendant and find him not guilty.

The law does not require the government to prove a defendant guilty beyond all possible doubt as such proof in many cases would be impossible. But the government must prove the defendant guilty beyond a reasonable doubt as defined in these instructions. A reasonable doubt may be created by a lack of evidence or it may be created by the evidence itself.

Count I of the indictment charges that the defendants Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas with having sold, bartered and exchanged to Joseph E. Goode the following narcotic drugs:

One bottle containing 189 $\frac{1}{2}$ grain morphine sulphate tablets.

One bottle containing 293 $\frac{1}{6}$ grain morphine sulphate tablets.

One bottle containing 501 $\frac{1}{4}$ grain morphine sulphate tablets.

One bottle containing 85 $\frac{1}{8}$ grain morphine sulphate tablets.

63 $\frac{1}{2}$ grain morphine sulphate tablets.

One bottle containing 177 grain powdered opium.

One bottle containing 51 $\frac{1}{4}$ grain codeine sulphate tablets.

One bottle containing 100 $\frac{1}{4}$ grain codeine phosphate tablets.

One bottle containing 100 $\frac{1}{2}$ grain codeine sulphate tablets.

One bottle containing 502 $\frac{1}{2}$ grain codeine sulphate tablets.

One bottle containing 40 copavin tablets.

One bottle containing 100 5-mg. dolophine tablets.

One bottle containing 39 copavin capsules.

One bottle containing 93 acetidine with codeine phosphate tablets.

"And said sale, barter, and exchange was not made [§30] pursuant to the written order of Joseph E. Goode upon a form issued for that purpose by the Secretary of the Treasury of the United States."

I instruct you as a matter of law that under the laws enacted by the Congress of the United States, it is unlawful for any person to sell, barter, or exchange narcotic drugs such as are named in Count I of the indictment except in pursuance of

a written order of the person to whom such narcotic drug is sold, bartered, exchanged on a form issued in blank for that purpose by the Secretary of the Treasury of the United States.

Count I of the indictment charges the defendant with the sale of certain narcotics just described to Joseph E. Goode on February 7th, 1948, at Everett, Washington. If you find from the evidence beyond a reasonable doubt that the defendant Barnett then and there had possession of the narcotics in question, intending to sell the narcotics, that said defendant and Joseph E. Goode then agreed upon a sale of said narcotics to said Goode, and agreed upon the price to be paid by Goode for the narcotics, that pursuant to such agreement the defendant Barnett delivered said narcotics to said Goode and that said Goode thereby then and there gained possession of said [331] narcotics and had them in his possession at the time of the arrest, then upon those conditions that transaction constituted a sale of the narcotics within the meaning of the acts of Congress prohibiting illegal sales of narcotics, even though said Goode had not yet actually paid over to defendant Barnett such agreed purchase price.

If you find from the evidence beyond a reasonable doubt that the defendant Barnett sold the drugs mentioned in Count I to Joseph E. Goode, and that such sale was not in pursuance of a written order of the said Goode on a form issued in blank by the Secretary of the Treasury of the United States, then in that event it is your duty to convict the defendant on Count I.

You are to determine in this case whether or not the plaintiff has established the fact of a sale between the defendant Barnett and the prosecuting witness Goode. If no sale was made between them, you will find the defendant Barnett not guilty of Count I of the indictment.

You are instructed that in order to find the defendant Garfield C. Barnett guilty of the offense charged in the indictment, it is not necessary that you find that he personally committed all of the acts charged. [332]

If you find beyond a reasonable doubt that he aided, abetted, counseled, commanded, induced or procured the commission of the crime alleged, then the defendant is just as guilty as if he individually perpetrated the crime, himself.

Count II of the indictment charges a conspiracy in that during the period from January 6, 1948, to February 7, 1948, at Everett, Washington, and other places in Snohomish County, Washington, and at Seattle, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas conspired, each with the other to commit an offense against the United States, to wit, to violate the provisions of Section 2554(a) of Title 26 United States Code, in this, that the said defendants conspired to sell, barter and exchange the narcotic drugs described in the first count of the indictment to Joseph E. Goode, Harvey Naylor and other persons to the grand jurors unknown, such sale, barter, and exchange not to be made pursuant to the written

order of the person or persons to whom said narcotics were to be sold, bartered or exchanged upon a form issued for that purpose by the Secretary of the Treasury of the United States. [333]

Count II further charges that after the formation of the alleged conspiracy, the defendant committed certain overt acts as follows:

1. During the period from January 6, 1948, to January 16, 1948, at Everett, Washington, the defendants Leonard A. Douglas and Ralph R. Macartney, Jr., had a conversation with each other.

2. On or about January 17th, 1948, the defendant Garfield C. Barnett drove from Everett, Washington, to the home of the defendant, Leonard A. Douglas, at Snohomish, Washington.

3. On or about January 17th, 1948, at Snohomish, Washington, the defendant Leonard A. Douglas delivered to the defendant Garfield C. Barnett a box containing the drugs described in Count I of this indictment.

4. At some date between January 16th, 1948, and February 7th, 1948, the exact time being to the grand jurors unknown, at Everett, Washington, the defendants Garfield C. Barnett, and Ralph R. Macartney, Jr., held a conversation with Harvey Nylon. [334]

5. On or about February 7th, 1948, at Everett, Washington, the defendant Garfield C. Barnett gave to Harvey Nylon two bottles, each containing a narcotic drug.

6. On or about February 7th, 1948, at Everett,

Washington, the defendant Garfield C. Barnett delivered to Joseph E. Goode a box containing the drugs described in the first count of this indictment.

The foregoing are the allegations contained in Count II of the indictment, which allegations concern the alleged conspiracy.

A conspiracy, as the word is used in the conspiracy law and in Count II of the indictment, is an agreement between two or more persons acting upon a common purpose to commit an offense. In so far as this case is concerned, the particular offense described in Count II.

There can be no conspiracy of any kind unless three elements are present. Those are, first, the act of conspiring together of two or more persons; second, to commit the particular offense charged in the indictment; and third, the doing of something [335] in furtherance of the unlawful design, although it is not necessary that the objects of such design be accomplished. There is no such thing as one person conspiring. A person who alone plans and commits a criminal act is not guilty of conspiracy.

It is not necessary to render a person guilty of conspiracy that he be one of the original persons forming the conspiracy. He may have joined it after its formation; and if so, he thereby becomes as guilty as one of the original conspirators. However, to render such a person guilty under such law it is necessary that, after he has intentionally be-

come a member of such conspiracy, some act be done by one of the conspirators towards carrying the unlawful agreement of the conspiracy into effect.

In order to establish the guilt of the defendant on trial—under the conspiracy count—it is necessary that the government prove by the evidence beyond a reasonable doubt, first, that the conspiracy was formed as alleged and that it was entered into by the defendant Barnett and the others as charged. And second, that within the jurisdiction of this after that particular defendant Barnett became a member of such conspiracy, one or more of the overt acts of the conspiracy set out in the indictment were [336] committed as alleged in the indictment.

You will note that Count II of the indictment, according to the charged conspiracy, also sets forth a number of so-called overt acts. But you are instructed that here proof of an overt act or overt acts as charged in Count II of the indictment alone proves no conspiracy without further proof beyond a reasonable doubt of an unlawful agreement entered into by two or more persons named in the indictment to commit the unlawful acts charged in Count II; and this is true even though the evidence shows the overt act or overt acts alleged to be unlawful in themselves.

You are further instructed that such overt act or overt acts must be found from the evidence to be clearly referable to the unlawful agreement, pro-

vided you find from the evidence that such unlawful agreement did, in fact, exist as alleged in Count II of the indictment.

Even participation in the offense itself, which is alleged to be the object of the conspiracy, does not alone necessarily prove a participant guilty of such conspiracy. There must in addition thereto be proved beyond a reasonable doubt the unlawful agreement and participation therein by the [337] particular defendant with knowledge on his part of the existence of the unlawful agreement charged in the indictment. These matters must be proved by the evidence beyond a reasonable doubt. The unlawful agreement is the gist of the offense of conspiracy and unless you find that two or more of the persons named in the indictment so entered into the unlawful agreement specifically charged in the indictment, and actually participated therein, and that one or more of the defendants committed at least one of the overt acts alleged in Count II of the indictment, with knowledge and in furtherance of such unlawful agreement, you cannot find the defendant on trial guilty in this case.

It is not necessary that the government prove all the overt acts alleged but at least one of such acts must be proved by the evidence beyond a reasonable doubt: It is not necessary that the overt act or acts done shall successfully consummate the conspiracy. It is necessary that such act or acts be done for the purpose of carrying the conspiracy into effect,

whether the conspiracy is finally consummated or not.

The common design, purpose and agreement between the participants are the essence of the [338] conspiracy. To prove that a conspiracy existed and was in operation, it is not necessary to prove that two or more persons entered into a written or express agreement or made any formal declaration acknowledging membership in the conspiracy, but it is necessary to prove by competent evidence beyond a reasonable doubt that they cooperated in furtherance of a common unlawful plan previously formed.

A conspiracy may exist either to do something unlawful or to do a lawful thing in an unlawful way.

You are instructed that on the question of whether the alleged conspiracy existed as charged in Count II of the indictment, you are not to consider any statements made or acts done by any defendant in furtherance of the alleged conspiracy in the absence of other defendants except against the individual making the statements and doing the acts unless you are convinced by the evidence beyond a reasonable doubt that the defendant so making such statements or doing such acts was authorized by another or other of the defendants to make those statements or do those acts in furtherance of the alleged conspiracy. And in such cases you will consider such evidence only against the defendant actually making [339] the statements or

doing the acts and such other and only such other defendants as you shall be convinced by the evidence beyond a reasonable doubt—if you are so convinced—authorized the making of such statements or the doing of such acts.

Where an unlawful object is sought to be effected and two or more persons actuated by a common purpose pursuing a preconceived plan to accomplish that purpose act or work together in any manner in furtherance of the unlawful scheme, each party consciously participating therein is a party to the conspiracy, no matter what part he takes in the execution of the object or plan; and if and only if two or more persons are proven to have combined together for the same illegal purpose.

Any act done by one of the parties in furtherance of the original concerted plan and in reference to the common object is in contemplation of law the act of all of those parties. Likewise, if and only if the conspiracy has been established by the evidence beyond a reasonable doubt, every one of the conspirators is bound by the declaration and acts of the co-conspirators in furtherance of the conspiracy. And under those circumstances the acts and statements of one, done and made in furtherance of the conspiracy, [340] are the statements and acts of all the persons who are members of a conspiracy.

As to an individual defendant, mere knowledge of an unlawful conspiracy is not sufficient to make

such individual defendant a member of such conspiracy, but before he is deemed criminally liable therefor it must appear from the evidence beyond a reasonable doubt that he actively participated in such conspiracy with intent to further the objects thereof. In other words, he must knowingly and intentionally have participated in the conspiracy, if any you find from the evidence with knowledge of such conspiracy before he can be found responsible therefor criminally.

If you should find that a conspiracy was entered into as charged in the indictment by two or more of the parties charged and that one or more of them did some one or more of the overt acts charged in the indictment, to carry forward a conspiracy, then each and all of the persons who entered into such conspiracy or became a party to it prior to its commission and prior to the doing of the overt act would be guilty as a member of the conspiracy.

The main questions presented for your consideration, [341] concerning the conspiracy, may be said to be, first, did a conspiracy exist as charged in the indictment; second, if such a conspiracy existed were one or more of the overt acts as charged committed in furtherance of the conspiracy; third, if you find a conspiracy was established and one or more of the overt acts were charged were committed was the defendant on trial a member of said conspiracy?

A conspiracy such as is alleged in Count II herein is not an omnibus charge under which the

prosecution can prove anything and everything. The charge or accusation is limited by the terms of the indictment. The indictment charges but one plan and one conspiracy. And the defendant on trial cannot be convicted thereunder unless it has been shown beyond a reasonable doubt that he consciously became a member of that conspiracy as alleged. Further, the scope of the conspiracy must be gathered from the testimony and not from the averments of the indictment. The latter may limit the scope of the evidence but cannot extend it.

A conspiracy may be established by circumstantial evidence or by deduction from all the facts proved. The common design is the essence of the crime, and this may be made to appear when the parties [342] steadily pursue the same object, whether acting separately or together, by common or different means. If such conduct of the parties leads to the same unlawful result, if the parties acted together to accomplish something unlawful as charged, a conspiracy is shown even though individual conspirators may have done acts in furtherance of the common unlawful design apart from and unknown to the others. All the conspirators need not be acquainted with each other. They may have not previously associated together. One defendant may know but one other member of the conspiracy. But if, knowing that others have combined to violate the law, a party knowingly cooperates to further the object of the conspiracy, he becomes a party thereto.

Intent is an ingredient of crime. The forming of an unlawful conspiracy is an act of the mind. It is psychologically impossible for you to enter into the mind of the defendant and determine the intent with which he operated. You must therefore determine the motive, purpose and intent from the evidence which has been presented and from all of the facts and circumstances disclosed by the witnesses as testified to, bearing [343] in mind that the law presumes that every man intends the natural and legitimate consequences of his own acts. Wrongful acts knowingly or intentionally committed cannot be justified on the ground of innocent intent. An intent may be presumed on the part of those consciously participating in the conspiracy, if unlawful acts have been committed as charged and it is shown that such acts were a part of the plan and intended to carry forward the conspiracy charged in the indictment.

If you find from the evidence that the defendant Barnett accepted delivery from Douglas on behalf of his client Macartney, and that he did not intend to sell the narcotics involved in this case, and did not become a member of the alleged conspiracy or did not intend by his act to further the object of the conspiracy, he is not guilty of either charge in this case, and it will then be your duty to find him not guilty as to both Counts I and II of the indictment.

It is not necessary for the government to prove that there was exactly the quantity of narcotics in-

volved as each count of the indictment alleges. But it is sufficient if the proof shows that the defendant is guilty of a violation charged [344] with reference to any quantity of narcotics whether such quantity be more or less than the amount alleged.

There are two kinds of evidence, direct or positive and circumstantial. Direct and positive testimony is that which a person observes or sees or which is susceptible of demonstration by the senses. And circumstantial evidence is proof of such facts and circumstances concerning the conduct of the parties which conclude or lead to a certain inevitable conclusion. Circumstantial evidence is legal and competent as a means of proving guilt in a criminal case. But the circumstances must be consistent with each other, consistent with the guilt of the parties charged, inconsistent with their innocence and inconsistent with every other reasonable hypothesis except that of guilt, and when circumstantial evidence is of that character it is alone sufficient to convict. You will review all of the circumstances in the light of this instruction.

You are instructed that as to any evidence admitted showing a prior conviction of any witness who has testified in this case, you will consider such evidence only in so far as it affects the credibility of such witness and for no other purpose. [345]

It is for you to determine, in the light of such conviction, what weight and credibility should be given to the testimony of such witness.

I instruct you that the witnesses, Macartney, Jr.,

and Douglas, are charged in the indictment as co-defendants and are known in law as alleged accomplices with the defendant on trial. An accomplice is defined to be one concerned with others in the commission of a crime. If you find that any witness in this case was concerned with the defendant on trial in the commission of the offense charged, then such witness was an accomplice with the defendant on trial. It is a settled rule in this country that even accomplices in the commission of a crime are competent witnesses, and that the government has the right to present their testimony, and the jury may properly consider it. The testimony of accomplices, however, is to be received with caution and weighed with great care. And while it is true that a jury may convict on such testimony alone, yet the jury should not rely on it unsupported for a conviction, unless it produces in their minds a positive conviction of its truth. If it does, the jury should act upon it. [346]

In considering the testimony of the witnesses Macartney, Jr., and Douglas, you should consider their appearance and demeanor on the witness stand, their manner of testifying, the probability or improbability of the facts to which they have testified, their motives or interests in the case, whether their testimony was given upon the promise or hope of reward or of mitigation of their offense, their apparent fairness or lack of fairness, their apparent candor or lack of candor, the reasonableness or unreasonableness of the story such witnesses relate,

whether or not their testimony is consistent with the other evidence or admitted facts in this case, and any other fact or circumstances arising from the evidence which appeal to your judgment as in anywise affecting the credibility of such accomplice witnesses. You are therefore instructed that you are to receive the testimony of such accomplice witnesses with caution and examine it with great care. This does not mean, however, that you are arbitrarily to reject it. It only means that you are to receive it with caution and examine it with great care; and if, having done so, and if having considered such testimony in the light of all of these rules, you thereafter believe beyond a reasonable [347] doubt in the truth of such witnesses' testimony, then you are to give it the same credence as the testimony of any other witness.

Where a defendant is accused of a crime, if the evidence shows that his general reputation for **honesty and integrity in the community** where he resides was good prior to the commission of such an offense, that is also a circumstance that you should take into account in determining whether under all of the evidence you are convinced of the defendant's guilt beyond a reasonable doubt. But the court instructs you that if after consideration of all of the evidence in this case, including the evidence concerning the reputation of the defendant, the jury is satisfied beyond a reasonable doubt of the guilt of the defendant on trial, then it is your duty to return a verdict of guilty notwithstanding the fact that heretofore he has borne a good repu-

tation for honesty, truth and fair dealing and as a law-abiding citizen.

You are the sole and exclusive judges of the evidence and of the credibility of the several witnesses and of the weight to be attached to the testimony of each. In weighing the testimony of a witness, you have the right to consider his [348] demeanor upon the witness stand, his apparent fairness or lack of fairness, the apparent candor or lack of candor of such witness, the reasonableness or unreasonableness of the story such witness relates and the interest, if any, you may believe a witness feels in the result of the trial and any other fact or circumstance arising from the evidence which appeals to your judgment as in anywise affecting the credibility of such witness, and to give to the testimony of the several witnesses just such degree of weight as in your judgment it is entitled to.

You will be slow to believe that any witness has testified falsely in the case but if you do believe that any witness has wilfully testified falsely to any material matter, then you are at liberty to disregard the testimony of such witness entirely except in so far as the same may be corroborated by other credible evidence in the case.

The defendant having testified as a witness, the foregoing relating to testimony of witnesses and the weight of testimony applies to the defendant in his testimony as well as to all of the other witnesses in the case.

You are instructed that the government does not

desire to have you bring in a verdict finding the [349] defendant guilty unless the verdict is supported by the evidence beyond a reasonable doubt. But that neither does the government want a guilty defendant to escape.

It is the duty of the court to instruct you as to the law governing the case and you must take such instructions of the court to be the law. You will consider such instruction as a whole and will not select any one of them and place undue emphasis on that one instruction. You will consider all evidence admitted by the court and now before you, and you will disregard all evidence and exhibits offered but not admitted by the court, and all evidence stricken out by the court.

In this connection you are instructed that you are not called upon to pass upon objections and exceptions made or taken by counsel and you should not allow the making of objections and the taking of exceptions by counsel to influence or confuse you.

In your deliberations and in reaching your verdict you should act only upon the evidence which has been admitted and is now before you and the law as it has been given to you by the court in these instructions. Statements, if any, by counsel and the court unsupported by your own recollection of [350] the evidence you will disregard. Likewise, you will disregard all statements made by counsel and the court to each other during the trial.

While it would be proper for me as a trial judge to analyze the testimony and to give you my under-

standing of it—which, however, would not be binding upon you—my purpose is not to intimate to you any opinion I may have of any factor or the weight of any evidence; and if I refer or have referred to any facts in the case, it will not be and has not been for the purpose of indicating any opinion I may have of the facts but simply to illustrate some proposition of the law which is involved with the facts.

It is your duty as jurors to confer with each other freely and frankly about and to discuss together honestly the questions involved in this case for the purpose of agreeing, if you can honestly do so, upon a common verdict.

In the end, however, the jury's verdict must be the verdict of each and all twelve of you. A verdict representing the opinions of any lesser number is not a lawful verdict.

The law does not contemplate that any one of you will surrender his or her own individual opinion [351] about the guilt or innocence of the defendant so long as such one of you personally has a reasonable doubt about the matter. Regardless of what the opinions of your fellow jurors may be, as long as you have a reasonable doubt about the guilt of the defendant—if you have such reasonable doubt—it is your duty to vote for an acquittal.

It is not the function of the jury to determine the kind or amount of punishment of a defendant found guilty by the jury. Under the law it is the duty of the court, unassisted by the jury, to determine such punishment. It is for the jury only to

decide the guilt or innocence of the defendant. If by the evidence beyond a reasonable doubt you are convinced of the guilt of the defendant now on trial before you as to one or more of the counts of the indictment, it will then be your duty to convict him on such count or counts, if any, as to which you are so convinced.

I might add this further thought to the jurors by way of an explanation of the present status of the case, as well as by way of an instruction on the law, counsel in the case of both sides have brought before the court and jury all of the admissible evidence that they know of to properly enable the [352] jury and the court to perform their respective functions. The court has fully instructed the jury on the law applicable to the case. It is not known to the attorneys or the trial judge what more could be done to properly enable the jury to perform its duty. You now have all the means necessary to a decision. In this court the instructions in written form are not sent to the jury room.

Also written transcripts of the testimony, orally stated from the witness stand, will not be sent to the jury room with you. It is for the jury to remember the evidence and the court's instruction.

The indictment in this case will be sent to the jury room with you merely to show you the paper charge against the defendant, but is not to be considered as evidence against him. You will take with you to the jury room the exhibits in the case and this form of verdict (indicating) which has been prepared by the Clerk of the Court for the

convenience of the jury. The verdict is in the usual form. As to each count on which defendant is being tried, before the word "guilty" is a blank space. You will write in that blank [353] in each instance the word "is" or "not" according as you find.

It will require your entire number to agree upon your verdict and when you have so agreed you will cause your verdict to be signed by your foreman whom you will elect from among your number immediately upon retiring to the jury room and return with your verdict into open court.

[Endorsed]: Filed July 16, 1948. [354]

[Endorsed]: No. 11954. United States Court of Appeals for the Ninth Circuit. Garfield C. Barnett, Appellant, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed July 22, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for
the Ninth Circuit.

United States Court of Appeals for the
Ninth Circuit

No. 11954

GARFIELD C. BARNETT,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLANT'S DESIGNATION OF POINTS
TO BE RELIED UPON ON APPEAL AND
PORTIONS OF RECORD TO BE
PRINTED

Comes now Garfield C. Barnett, the appellant herein, and hereby designates the points to be relied upon on appeal and portions of the record to be printed.

Appellant herein claims that the trial judge committed error (1) in allowing testimony of Ralph R. Macartney, Jr., and Leonard A. Douglas as to conversations had between them not in the presence of defendant; (2) in taking over examination of witness, Harvey Naylor and calling undue attention thereto; (3) in denying appellant's motion for ac-

quittal at the close of plaintiff's case, and (4) in denying appellant's motion for judgment notwithstanding the verdict or for a new trial.

* * * *

Dated this 22nd day of July, 1948.

/s/ DAILEY & CONROY,
Attorneys for Appellant.

Service admitted and copy received this 23rd day of July, 1948.

/s/ J. CHARLES DENNIS,
United States Attorney.

[Endorsed]: Filed July 24, 1948. Paul P.
O'Brien, Clerk.

No. 11954

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

FILED

SEP 21 1948

P. O'BRIEN,

CLERK

DAILEY & CONROY
Attorneys for Appellant
211 Stokes Building
Everett, Washington



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No. 11954

IN THE
United States
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GARFIELD C. BARNETT,
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vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLANT

JURISDICTION OF THE COURT

This is an appeal from a conviction in the District Court of the Western District of Washington, Northern Division, upon an indictment charging ap-

pellant and others with the illegal sale of narcotics and with a conspiracy to violate the law.

The Federal Courts have jurisdiction to determine all crimes and offenses cognizable under the authority of the United States and issues arising out of the construction of Federal Statutes (28 U.S.C.A. 41; Judicial Code, Section 24 amended)

The Circuit Court of Appeals has jurisdiction to review judgments of the district court (28 U.S.C.A. 225; Judicial Code Section 128 amended).

STATEMENT OF THE CASE

The Grand Jury for the Northern Division of the Western District of Washington returned an indictment as follows:

"Indictment

The Grand Jury charges:

COUNT I

On or about February 7, 1948, at Everett, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas, sold, bartered and exchanged to Joseph E. Goode the following narcotic drugs:

- 1 bottle containing 189 $\frac{1}{2}$ gr. morphine sulphate tablets
- 1 bottle containing 292 $\frac{1}{6}$ gr. morphine sulphate tablets
- 1 bottle containing 501 $\frac{1}{4}$ gr. morphine sulphate tablets

- 1 bottle containing 85 $\frac{1}{8}$ gr. morphine sulphate tablets
- 63 $\frac{1}{2}$ gr. morphine sulphate tablets
- 1 bottle containing 177 gr. powdered opium
- 1 bottle containing 61 $\frac{1}{4}$ gr. codeine sulphate tablets
- 1 bottle containing 100 $\frac{1}{4}$ gr. codeine phosphate tablets
- 1 bottle containing 100 $\frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing 502 $\frac{1}{2}$ gr. codeine sulphate tablets
- 1 bottle containing 40 copavin tablets
- 1 bottle containing 100 5-mg. dolophine tablets
- 1 bottle containing 39 copavin capsules
- 1 bottle containing 93 acetidine with codeine phosphate tablets

and said sale, barter, and exchange was not made pursuant to the written order of Joseph E. Goode upon a form issued for that purpose by the Secretary of the Treasury of the United States.

All in violation of 26 USC 2554(a) and 2557(b).

COUNT II

On or about and during the period from January 6, 1948, to February 7, 1948, both dates included, at Everett, Washington, and other places in Snohomish County, Washington, and at Seattle, Washington, Garfield C. Barnett, Ralph R. Macartney, Jr., and Leonard A. Douglas, hereinafter called the defendants, conspired each with the other to commit an offense against the United States, to-wit, to violate the provisions of Section 2554(a) of Title 26, United States Code, in this, that said defendants conspired to sell, barter and exchange the narcotic drugs described in

the first count of this Indictment to Joseph E. Goode, Harvey Neylon, and other persons to these grand jurors unknown, such sale, barter and exchange not to be made pursuant to the written order of the person or persons to whom said narcotics were to be sold, bartered or exchanged upon a form issued for that purpose by the Secretary of the Treasury of the United States.

That after the formation of said conspiracy, and in order to effect the object thereof, the defendants committed certain overt acts as follows:

1. During the period from January 6, 1948, to January 16, 1948, at Everett, Washington, the defendants Leonard A. Douglas and Ralph R. Macartney, Jr., had a conversation with each other.
2. On or about January 17, 1948, the defendant Garfield C. Barnett drove from Everett, Washington, to the home of the defendant Leonard A. Douglas at Snohomish, Washington.
3. On or about January 17, 1948, at Snohomish, Washington, the defendant Leonard A. Douglas delivered to the defendant Garfield C. Barnett a box containing the drugs described in Count I of this Indictment.
4. At some date between January 16, 1948, and February 7, 1948, the exact time being to the grand jurors unknown, at Everett, Washington, the defendants Garfield C. Barnett, and Ralph R. Macartney, Jr., held a conversation with Harvey Neylon.
5. On or about February 7, 1948, at Everett, Washington, the defendant Garfield C. Barnett gave to Harvey Neylon two bottles, each containing a narcotic drug.
6. On or about February 7, 1948, at Everett,

Washington, the defendant Garfield C. Barnett delivered to Joseph E. Goode a box containing the drugs described in the first count in this Indictment.

All in violation 18 U.S.C. 88.”

Defendants Barnett and Macartney were arraigned and plead not guilty to both counts of the indictment. Defendant Douglas was not present. On the day scheduled for trial Defendant Macartney changed his plea on Count II to one of guilty. Defendant Douglas was arraigned and plead guilty to Count II, no plea being entered to Count I.

Trial was had as to defendant Barnett only and the jury returned a verdict of guilty on both counts.

Count I of the indictment was dismissed as to defendants Douglas [8]* and Macartney [9] and they were never brought to trial on that count.

Motions for judgment notwithstanding the verdict or for a new trial were denied by the District Court [12].

SPECIFICATION OF ERRORS

Appellant herein claims that the trial judge

*Page numbering appearing at top of page of printed Transcript of Record.

committed error (1) in allowing testimony of Ralph R. Macartney, Jr., and Leonard A. Douglas as to conversations had between them not in the presence of defendant; (2) in taking over examination of witness, Harvey Naylor and calling undue attention thereto; (3) in denying appellant's motion for acquittal at the close of plaintiff's case, and (4) in denying appellant's motion for judgment notwithstanding the verdict or for a new trial.

ARGUMENT ON SPECIFICATION No. 1

The District Court erred in allowing testimony of Ralph R. Macartney, Jr., and Leonard A. Douglas in evidence as to conversations they had in the absence of the appellant. Testimony of Ralph R. Macartney in this connection commences on page 19 of the printed transcript of record and that of Leonard A. Douglas on page 147.

In *Quercia v. U. S.* 70 Fed. (2d) 997, the court held that admissions or statements of one or two co-defendants not in the presence of the other are not admissible against the absent one. Unless there is other evidence of joint action, this is a correct rule; but where there is prior evidence of an agreement to commit, or the joint commission of an offense, the statement of one is evidence against all who are con-

cerned in it, if made in furtherance of the common design.

It is to be noted that in the instant case the sale count (Count I) was dismissed as to both Macartney and Douglas. The eagerness with which the witnesses testified is best exemplified by that testimony of Macartney on page 33 where he said

“I entered a plea of guilty because technically I was guilty * * *”

Both witnesses were confined in the Washington State Penitentiary for other offenses and were eager to escape any further possible confinement, as one of them did. [7 and 8]

A review of the testimony shows that defendant Douglas never had any conversations with appellant at all concerning either a sale or a conspiracy and testimony of conversations he had with Macartney clearly should not have been admitted because those conversations were not in furtherance of any common design involving appellant.

Testimony of Macartney does not add up to a straight story except in his effort to try to gain leniency for himself by testifying. His testimony in one regard was that there was to be a three-way split between himself, Douglas and appellant and that he

and Douglas had agreed upon this. Then on page 40 he testified that he was to get nothing except attorney fees, which, on pages 34 and 35, he testified had already been provided for by his father. All the testimony of Macartney and Douglas taken as a whole does not show any common design on the part of three people to form a conspiracy.

ARGUMENTS ON SPECIFICATIONS III and IV

The District Court erred in denying appellant's motion for acquittal at the close of plaintiff's case and in denying the appellant's motion for judgment notwithstanding the verdict or for a new trial.

The question to be determined is whether the evidence introduced shows a completed sale under the law.

Appellant was charged with having sold, bartered, and exchanged to one Joseph E. Goode certain narcotic drugs as set out in the indictment, *supra*. Taking the most favorable view possible of the government evidence the testimony presented does not show a sale, barter or exchange.

In order to have a sale there must be a complete agreement between the parties as to the terms of the

sale and including a transfer of the property or a payment of money.

This court in *Ratigan v. U. S.*, 88 Fed. (2d) 919, held that the essence of a sale is a transfer of property in a thing for money. The facts as briefly stated in the opinion show that defendant had given narcotics to a third person by hypodermic injection. The court held that there must be a delivery to have a sale and that transfer by hypodermic was a delivery and therefore constituted a sale.

In *Fisk v. U. S.*, 279 Fed. 12, the court held that a sale was completed when the price was agreed upon and the drugs had been delivered to and accepted by the inspector and were under his control and possession although the money had not yet been paid.

In *Hurwitz v. U. S.*, 299 Fed. 449, the facts as briefly in the opinion were that a buyer had paid \$50.00 in marked money to a doctor in her house for narcotics and on the way out to his car to get them he was arrested and had the marked money on his person. The court held this was sufficient evidence to show a completed sale and not merely an executory contract of sale.

In the case of *Reyff v. U. S.*, 2 Fed. (2d) 39, the court held that a sale of liquor was complete when

all terms had been agreed upon, the money had been paid to the seller and nothing remained to be done except to deliver the liquor.

In *Canadian Northern Railway v. Northern Mississippi Railway*, 209 Fed. 758, at page 761, the court held that under a contract of sale of personal property for cash the title and ownership of the property remains in the vendor until the purchase price is paid in cash.

In *Ahearn v. U. S.*, 3 Fed. (2d) 808, the court held that a sale was complete when all terms of a sale of liquor had been agreed upon, including the quantity to be sold, the purchase price, the time and place of delivery and delivery had in fact been made.

A sale is a contract which, of course, requires a meeting of the minds first and then the actual doing of something to transfer the property itself or title to it.

Agent Goode never intended to buy and could not have bought anything for \$6,000.00 because by his own testimony [87] he had only \$302.00 with him. Agent Crisler testified [98] that he had furnished Agent Goode with \$500.00 in various denominations of currency. Thus Agent Goode never in his own mind intended to buy anything.

Government witnesses, Harvey Naylor and Joseph Goode testified that they and appellant were the only parties present at the time of the purported sale.

No where in the testimony of Agent Goode is there any mention of any kind of narcotics, yet there are eight kinds which he is supposed to have bought according to the indictment, including some powdered and some in tablet form.

Agent Goode testified [88 and 89] that a price of six thousand dollars had been agreed upon and also that a price of \$6.00 a grain had been agreed upon. This testimony would indicate that no final agreement had been made.

Harvey Naylor testified [70] that a price of \$6.00 a grain had been agreed upon but that Agent Goode wanted to count the narcotics. Naylor makes no mention at all of any \$6,000.00 agreement. It is from the testimony of these two men that we must find evidence of a final agreement of sale, if such agreement ever existed.

The testimony of these witnesses does not show an agreement that would sustain an action at law for the sale of goods. There was no agreement as to what was to be sold, the quantity or the price of it. A look at the number of different things in the indictment

shows clearly that an agreement to sell them could not possibly have been arrived at without more than is shown by the testimony here.

Agent Goode testified [96] that he never handed over any money or paid a cent to appellant.

This court in the Ratigan case, *supra*, held that the essence of a sale is a transfer of the property in a thing for money.

But, even assuming that an agreement had been made for the sale, no money had been paid. The question, then, is whether a delivery was made. It can be seen from the Ratigan case, the Fisk case, the Reyff case, the Canadian Northern Railway case, and the Ahearn case, all *supra*, that there must be an agreement and a payment of money or delivery of the goods before it can be said that there was a sale.

In the instant case, no delivery to Agent Goode was ever had, and the narcotics were never in his possession or under his control, even after appellant had been arrested. Testimony of Agent Goode [89] was that the box of narcotics was placed on a table and that he looked at them and then said, "Well, it looks like all the tablets are here. I will take it." This clearly indicates that up until this time, Agent Goode had not agreed to take anything, otherwise there was no reason for his saying, "I will take it."

It should be noted that he never took any narcotics, and never paid a cent. His next move was to arrest appellant.

Harvey Naylor testified [81 and 82] that Goode arrested appellant as soon as the box was opened up and also that he, Naylor, took some narcotics at that time. Agent Goode [95 and 96] did not see Naylor take anything — thus further demonstrating that Goode did not have any narcotics in his possession or under his control at any time.

As can be seen from the above cited cases the courts have consistently held that to have a sale for cash there must be an agreement as to all parts of the sale *and* a delivery of the goods or a payment of the money. In the instant case there was no such agreement and there was no payment of money and no delivery of anything.

A review of the other cases shows that in every instance there must have been an agreement of sale and delivery of goods or payment of money.

In the case of *Hammer v. U. S.*, 249 Fed. 336, the court talks about an agreement being a completed sale when nothing remains to be done except deliver the goods and receive the money. It is to be pointed out that the facts of that case do not bear out the

syllabus statement. The facts, as briefly stated in the opinion, show that defendant placed a package of narcotics in interstate commerce by sending them via collect express, consigned to a buyer in another state. The package was consigned in the buyer's name to a destination named by him and therefore had left defendant's control and possession — hence was delivered to the buyer.

The courts in numerous cases have held that the evidence was sufficient to show a sale but an examination of each case shows that a delivery was in fact made or money was in fact paid.

In *Leon v. U. S.*, 290 Fed. 384, this court upheld a conviction for dealing in narcotics without having registered and paid the tax. A government agent agreed to buy morphine at \$65.00 an ounce, had tasted it, wrapped it up and put it in his pocket. He pulled out his money and said "Here" and then pulled a gun and arrested defendants.

In *Hirata v. U. S.*, 290 Fed. 197, this court held that a sale was shown where the facts were that a police officer gave a girl some marked money with which to buy morphine from defendant. She went into a hotel, met defendant and came out with a package of morphine which she gave to the officer who

then arrested defendant and found the marked money in defendant's pocket.

In *Sterling v. U. S.*, 289 Fed. 635, an indictment charged a sale of narcotics to a government agent. The evidence showed that the agent went with a third party to defendant's house where the agent gave money to this third party who then went upstairs with defendant and then came down with narcotics which he delivered to the agent. The court held that the evidence did not show a sale to the government agent.

In *Crampton v. U. S.*, 16 Fed. (2d) 231, the evidence was that government agents searched a witness, gave him marked money and observed him going into and coming out of a drugstore. The witness was again searched and had morphine on him. The agents arrested a woman in the drugstore as she was attempting to wash the marked money down a sink. The court held that delivery of morphine and possession of marked money by the defendant was sufficient to support a conviction of sale.

In *Smith v. U. S.*, 284 Fed. 673, the facts showed that government agents gave defendant money for a sale of narcotics and then took it away from him to use for evidence. The court held that a sale was

shown even though they planned to take back the money they had paid him.

In every case cited the courts have held that there is no sale unless there has been an agreement and a delivery of either the goods or the money. The writer had found no cases of record where it has been held to be a sale unless there was an agreement and a delivery of goods or payment of money. In the millions of daily business sales nothing is taken as sold unless there is first an agreement and then a delivery of the goods or a payment of money.

The courts have held in cases too numerous to cite that the federal narcotics act is a taxing act and must be construed as such.

It is significant that Congress has not found it necessary to amend the act in order to define what constitutes a sale. The courts have been unanimous in holding that a sale was not complete until an agreement was made, and a delivery of the goods or payment of money for them. Every case cited herein holding that a sale was shown, had as part of its facts an absolute agreement and a transfer of physical possession of the property or a payment of money as in the marked money cases.

Criminal and tax laws are all statutory and are to be strictly construed. It is neither the duty or

privilege of the court to change such laws by judicial decision. The cases cited all uphold a strict construction of the law and we respectfully pray that this continue to be the case and that this court correct the error of the District Court in this case.

Respectfully submitted,

DAILEY & CONROY
Attorneys for Appellant

Office and Post Office Address:
211 Stokes Building
Everett, Washington

No. 11954

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

J. CHARLES DENNIS,
United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
SEATTLE 4, WASHINGTON

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United States Attorney

HARRY SAGER,
Assistant United States Attorney
Attorneys for Appellee

OFFICE AND POST OFFICE ADDRESS:
1017 UNITED STATES COURT HOUSE
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No. 11954

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEE

JURISDICTION

In the present cause, appellant was regularly indicted, represented by counsel, tried and convicted on Counts I and II. Copy of the indictment is found on pages 2 to 5 of appellant's brief.

Jurisdiction is based upon Title 28 U.S.C. 41,

Title 26 U.S.C. 2554(a) and 2557(b), and Title 18 U.S.C. 88.

On Count I appellant received a sentence of three years and nine months; on Count II, a sentence of one day.

STATEMENT OF THE CASE

Ralph R. Macartney, Jr. and Leonard A. Douglas were prisoners in the Snohomish County Jail under State charges. Garfield C. Barnett was attorney for Macartney. Douglas had stolen the narcotic drugs referred to in the indictment. While in the jail, he informed Macartney that he had approximately 1,000 grains of narcotic drugs and asked Macartney what they were worth, and if he could sell them (R. 20). Macartney told Douglas that the drugs were worth \$10.00 per grain; that he knew a user named Harvey Naylor; that his attorney, Garfield C. Barnett, appellant herein, would see Naylor (R. 21-23). On these facts being presented to Barnett, the latter agreed to take charge of the sale of the drugs (R. 24), and Douglas agreed to deliver the box of drugs to Barnett (R. 24).

Barnett went to Douglas' home and obtained the box of narcotic drugs from Douglas (R. 143).

The agreement between the three was one-third

to Douglas, one-third to Barnett, and one-third to Macartney — Barnett to deduct in addition his attorney's fee from Macartney's one-third (R. 30).

After receiving the drugs from Douglas, Barnett called upon Harvey Naylon at his residence in Seattle, the Ritz Hotel. He told Naylon that a client of his had some narcotics that were available to the extent of 1,000 grains; that the price was \$10,000.00; that his name had been given him by Macartney. That he wanted to know if Naylon knew of anybody that wanted them, or if he could use them himself (R. 48).

Naylon was interested, and made an appointment to meet Barnett at his office in Everett. Barnett and Naylon went to the jail, and the three, Macartney, Barnett and Naylon discussed the sale. Macartney said the price was \$10,000.00.

In order to prove to Naylon that the drugs were actually narcotics, he told Barnett to give Naylon a sample. Accordingly, Barnett and Naylon returned to Barnett's office and examined the box of drugs. Barnett gave to Naylon two bottles of cocaine, and one bottle of H.M.C. — 100 tablets containing hyosine, morphine and cactine (R. 53).

Naylon made a second trip to Barnett's office,

attempting to buy some of the drugs and to get the price reduced. On this occasion he told Barnett that the drugs were "hot" and he had better throw them in the river (R. 63). Barnett said that he had an interest in them and he was going through with it.

Naylon went a third time to Barnett's office. He told Barnett that he had a purchaser, but that the purchaser insisted on a sample. Accordingly, Barnett gave him a sample of morphine.

When Naylon failed to appear with the purchaser, Barnett went to the Ritz Hotel, met Mrs. Naylon, and told her to tell Naylon — "I am not after him with an axe, but tell him to get in touch with me right away. I made a bargain with him and I expect him to keep his end of it." (R. 125).

Naylon not having the money to purchase the drugs, notified the Federal Bureau of Narcotics concerning his dealings with Barnett. A phone call was put through by Naylon to Barnett. The exact words are to be found on page 112 of the transcript.

Naylon said, "I have got ahold of that man and he will take everything that you have got. He will only pay \$6 a grain for all that you have got." Barnett hesitated for quite awhile. Finally he said, "O. K. — right; I will take it."

Arrangements between Naylon and Barnett were made for the purchaser to be at Barnett's office at 5:00 o'clock in the afternoon. Joseph A. Goode, a Narcotic Inspector, accompanied Naylon. Naylon introduced Goode to Barnett as "Joe", the man who had the money to buy the narcotics. Goode said he was the man that had the money; that he would not pay more than \$6 a grain for the narcotics. Barnett said he would take that; that he had about one thousand — at least one thousand grains, and the price would be \$6,000 (R. 88).

"Q. Was there anything else said about the price or the quantity or anything else, Mr. Goode?

A. Well, Mr. Barnett said he would sell them for six thousand dollars. And that was the price agreed on before he went out. Of course, I wanted to see the narcotics * * *." (R. 89)

Barnett left the office, returned with the narcotics, and said, "Here is the box of narcotics" and placed them on the table.

"I looked at the bottles in this cigar box, and I had taken one of the morphine quarter grains. He (Barnett) got a piece of Kleenex, and I poured them on the desk and I says, 'Well, it looks like all of the tablets are here. I will take it'." (Goode's testimony R. 89)

Thereupon Goode disclosed his identity, and Barnett was placed under arrest.

ARGUMENT

There are two counts in the indictment, Count I as to sale of the narcotics; Count II as to conspiracy. At the close of the Government's case, counsel for appellant made no motion as to Count II, the conspiracy count. The only motion that appears in the record is as follows:

“At this time, if your Honor please, at the close of the Government's case, on behalf of the defendant, I move the Court for judgment of acquittal as to Count I.”

He did file a motion for a new trial and for judgment notwithstanding the verdict of the jury after the verdict was returned.

As to Count II, there can of course, be no question as to the sufficiency of the evidence.

The evidence disclosed the agreement, which was undisputed, and the commission of six overt acts, all within the Northern Division of the Western District of Washington. All were not only proven, but undisputed—

1. The conversation between Macartney and Douglas (R. 20);
2. That Barnett drove from Everett, Washing-

ton, to the home of defendant, Leonard Douglas (R. 150);

3. That on January 17, 1948, at Snohomish, Washington, defendant, Douglas delivered to Barnett a box containing narcotic drugs (R. 150);
4. The conversation between Macartney, Naylor and Barnett (R. 60, 26);
5. On or about February 7, 1948, at Everett, Washington, Barnett gave to Naylor two bottles, each containing a narcotic drug (R. 53);
6. On or about February 7, 1948, at Everett, Washington, the defendant, Garfield C. Barnett, delivered to Joseph E. Goode a box containing the drugs described in the first count of the indictment (R. 89).

The agreement being proven, and one or more overt acts in furtherance of the agreement, there is no question as to specifications three and four as far as Count II of the indictment is concerned.

As to specification number two, appellant neither referred to it in the brief, nor did he raise any such issue during the trial.

As to specification number one, the testimony referred to is not specified. However, during the trial, counsel objected to the conversation between defendants Macartney and Douglas relating to the drugs in question — overt act number one of the indictment.

The Court properly instructed the jury concern-

ing this testimony, not only during the trial, but also in his instructions to the jury (R. 144), (R. 20), (R. 169).

In a conspiracy case, the Government is entitled, and should show the existence of the conspiracy from the beginning.

United States v. McGuire, 64 Fed. (2d) 485.

The order of proof rests in the discretion of the trial judge. He may, in his discretion, permit the admission of evidence requiring a preliminary foundation prior to connection.

Ashbaugh v. United States, 13 Fed. (2d) 591;

Beavers v. United States, 3 Fed. (2d) 860;

Gladstone v. United States, 248 Fed. 117.

The conspiracy started with the agreement between Macartney and Douglas. This is the testimony referred to in the specification. The agreement therein made was immediately accepted by Barnett and from that moment he was the active participant in the execution of the conspiracy.

A conspirator is criminally responsible for the acts of his co-conspirators which are committed in furtherance of the common design and follow incidentally as the natural and probable consequences

of such design, even though he was not present when the acts were committed.

Bartlett v. United States, 166 Fed (2d) 920;
Cummings v. United States, 15 Fed. (2d) 168;
United States v. Rosenberg, 150 Fed. (2d) 788;
Ford v. United States, 10 Fed. (2d) 339.

In the case of *United States v. Woods*, 66 Fed. (2d) 262, the Court properly states the law as follows:

“It is said that it was error to permit Mills to testify that Mrs. Woods told him she would have Libero Santaniello get the \$150 which Libero gave Mills the next morning but that was admissible under the well known principle that what one conspirator says about the scheme while it is being carried out may be shown against all.”

And the case quoted by appellant in his brief — *Quercia v. United States*, 70 Fed (2d) 997, is to the same effect.

There was not only no error in the admission of the testimony, but the testimony herein is almost identical with the facts related by appellant to Allyn B. Crisler (R. 99), and to Giordano (R. 115).

AS TO COUNT I.

Title 26 U.S.C., 2554 provides:

“It shall be unlawful for any person to sell, barter, exchange, or give away any of the drugs

mentioned in Section 2550(a) except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged or given, on a form to be issued in blank for that purpose by the Secretary * * *

Section 2550(a) includes the drugs herein involved. Joseph A. Goode had no written order (R. 93).

Appellant had these drugs for sale. He had been endeavoring to sell these drugs to Nylon. The agreement to sell was made over the phone. Goode told Barnett that he would not pay more than \$6 per grain for the narcotics. Barnett said he would take that. He said he had about 1,000 — at least 1,000 grains, and it would be six thousand dollars (R. 88).

Barnett said he would sell them for \$6,000. Goode agreed to that figure (R. 89).

Barnett had Nylon and Goode step out of the room. He returned with the narcotics. He placed them on the table and Goode took them and said: "Well, it looks like all of the tablets are here. I will take it."

In this case, the terms of the sale were all agreed upon — delivery was made, the only thing remaining was the payment of the purchase price.

Proof of these facts constitutes a violation of the narcotic laws.

The leading case is *Hammer v. United States*, 249 Fed. 336. In that case the Court ruled that if the parties had agreed on all the terms, and nothing remained to be done, except at delivery the payment should be made, then a sale was completed when the contract was made.

(Quoting *Hatch v. Standard Oil Co.*, 100 U.S. 124, 25 L. Ed. 554.)

This was followed by *Fisk v. United States*, 279 Fed. 12, in which case this identical question arose. The Court said (page 15):

“The claim of the defendant in error that the evidence failed to show a completed sale is merely technical. The price had been agreed upon, and the drugs delivered by the defendant to Anderson, accepted by him, and were then in his possession and under his control. True, Anderson had not yet paid the defendant the price agreed upon, at the time he placed him under arrest. Nevertheless if the drugs sold and delivered had been commodities of lawful or unrestricted commerce, the seller, upon this state of facts, could have maintained an action for the contract price of goods sold and delivered to the buyer.”

The Hammer case has been cited with approval in this Circuit in the case of *Reyff v. United States*, 2 Fed. (2d) 39:

“At the time when the automobile entered the garage the negotiations * * * were no longer in the class of mere executory agreements. They had resulted in a sale whereby the right and title to the liquor had passed to the purchaser. The terms had been agreed upon and complied with. The purchase money had been paid and nothing remained to be done but to deliver the property at the place agreed upon, and the property had been brought to that place to be taken out of the automobile and placed upon the floor of the garage.”

Quoting *Hammer v. United States*, 249 Fed 336; *Hatch v. Standard Oil Co.*, 100 U.S. 124, 25 L. Ed. 554.

And in the case of *Hurwitz v. United States*. 299 Fed. 453, the *Hammer* case was quoted with approval. In that case an addict phoned a physician offering to purchase narcotics. The physician came to the house. The \$50.00 was paid, but there was no delivery. The Court upheld the conviction.

And in the case of *Ahearn v. United States*, 3 Fed. (2d) 808, this Circuit again cited with approval the doctrine of the *Hammer* case. Judge Rudkin speaking for the Court said:

“As to the whiskey mentioned in the second count, it clearly appears from the testimony that the parties had fully agreed upon all the terms of the sale, the quantity to be sold, * * * and that delivery was in fact made. Nothing remained

to be done but the payment of the purchase price, and for this an action would lie."

Counsel for appellant took no exception to the instructions. The appellant herein was well represented and had a fair trial. The law is plain. The conviction of the appellant should be affirmed.

Respectfully submitted,

J. CHARLES DENNIS
United States Attorney

HARRY SAGER
Assistant United States Attorney

No. 11954

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

FILED

JAN 31 1949

DAILEY & CONROY
Attorneys for Appellant
211 Stokes Building
Everett, Washington

PAUL P. O'BRIEN,
CLERK



No. 11954

IN THE
United States
Circuit Court of Appeals
FOR THE NINTH CIRCUIT

GARFIELD C. BARNETT,
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vs.

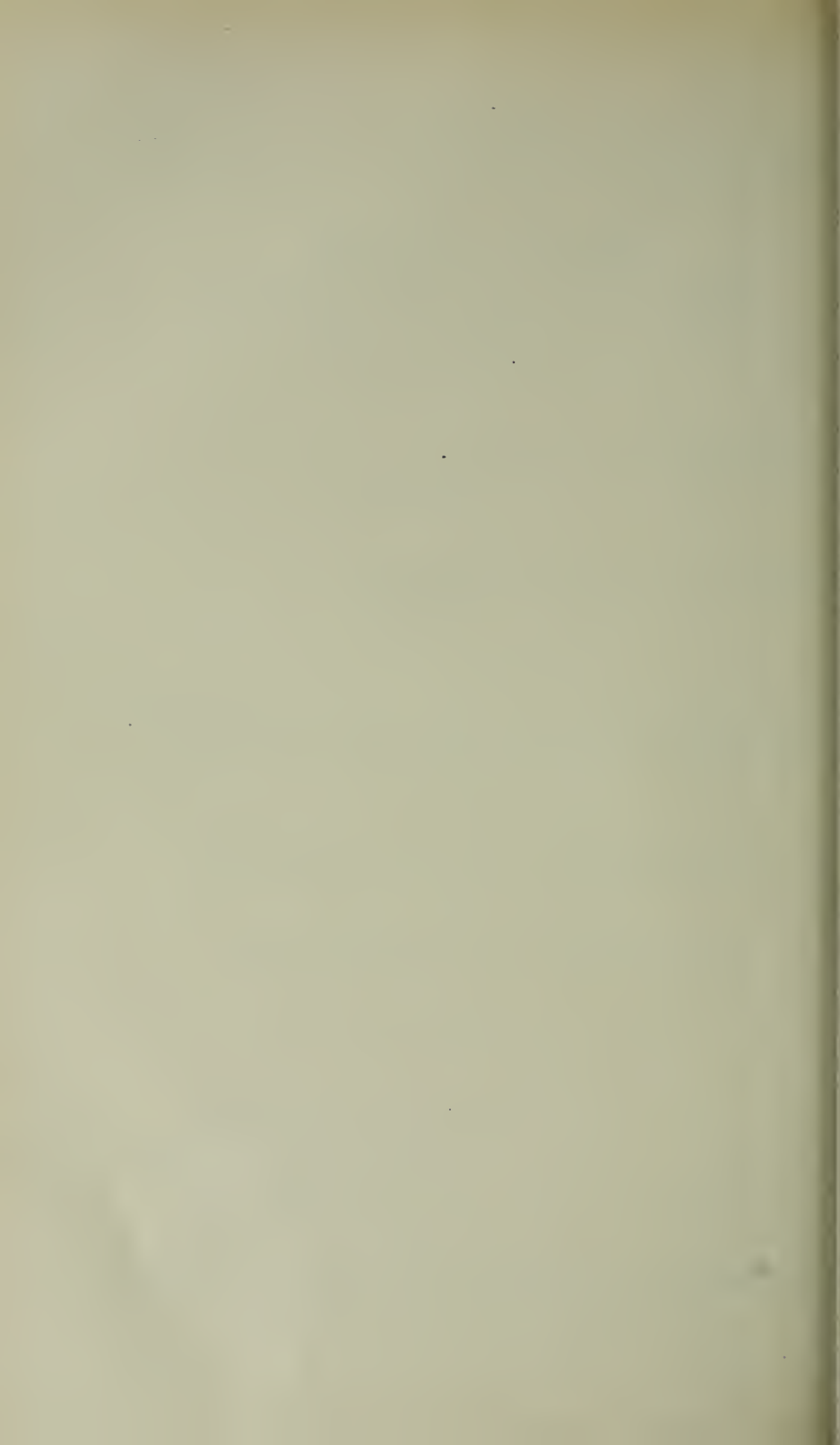
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Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
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HONORABLE JOHN C. BOWEN, *Judge*

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DAILEY & CONROY
Attorneys for Appellant
211 Stokes Building
Everett, Washington



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No. 11954

IN THE
United States
Circuit Court of Appeals
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GARFIELD C. BARNETT,
Appellant

vs.

UNITED STATES OF AMERICA,
Appellee

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED
STATES FOR THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

PETITION FOR REHEARING

Under authority of Rule 25, Rules of the U. S.
Circuit Court of Appeals, appellant, by and through
his undersigned attorneys, hereby petitions the Hon-
orable Court for a rehearing in the above entitled
cause in which the Judgment of Affirmance was filed
in this court on January 3, 1949.

The petition is filed for the following reasons and upon the following grounds:

This court, on page two of the printed opinion said that "the evidence discloses that Goode had possession of the box of narcotics, had taken one of the morphine quarter grains and examined the balance and had completed the transaction by stating that he would take them." The evidence does not disclose any such possession. In fact, the evidence establishes exactly the opposite. Goode testified (p. 89)* as follows:

"Q. What did you do?

A. I looked at the bottles in this cigar box and I had taken one of the morphine quarter grains. He got a piece of Kleenex and I poured them on the desk and I says, 'Well, it looks like all of the tablets are here. I will take it.' Then I showed him my badge and told him I was a Federal narcotic agent and he was under arrest."

From Goode's own testimony it is clear that any other examination he made of the contents of the box was made after he had arrested Barnett and not before. The court makes no mention of the fact that Neylon took some narcotics during the time Goode was supposedly in possession of them. If Agent Goode was in possession he must have seen Neylon remove

*Page numbers of printed transcript.

the narcotics before Neylon went out to call the other agents at the direction of Goode. Neylon admitted (pp. 71, 81, 82) taking the drugs during the time the court says Goode had possession of them. They were found on him by Agents Giordano and Graben. Goode admitted (p. 95) that he did not see Neylon take anything. Possession by Goode would have given him knowledge of the act of Neylon in taking some narcotics. It was physically impossible for Goode to have had possession and not known that Neylon took one of the bottles from the box. On the contrary, defendant Barnett informed the narcotics officers (p. 95) that Neylon had taken some narcotics from the box, a clear indication that Barnett had possession of the drugs and not Goode.

This court said that if Goode did not have actual possession, then it was constructive possession and delivery. This holding is in direct conflict with previous holdings of this and other courts. There is no such thing as constructive delivery and sale in connection with cash sales of the kind claimed herein. Constructive possession and delivery is limited in its application. When actual delivery, under the facts of the case, is possible, then constructive delivery is insufficient. Constructive delivery is only necessary where the goods are ponderous or bulky and can not

be conveniently delivered manually. *46 Am. Jur. Sec. 434*. Even then there is usually given or delivered to the buyer some indication of ownership or title to the property, such as a written matter.

At any rate, when an article such as the box of narcotics, which is very small, as in the instant case, is the subject of delivery, when actual, manual delivery was the easiest way of giving it to a buyer, then it would seem not to be law that a court should place the constructive delivery upon the article. When actual delivery is of the greatest importance in determining whether or not title to goods has passed under the facts in this case, it does not seem to be sound legal reasoning to say constructive delivery exists. The obvious answer is that if the parties intended to complete a sale, Barnett would have handed the drugs to Goode and then there would have been no question of delivery.

To hold that the facts of this case are delivery and transfer of possession places a strained construction on the cited cases and also makes new law, because no case has gone so far as the holding in this case. If we followed the logic of this opinion we have the following example as law: A goes in to B's store with \$302.00 (the amount Agent Goode had) in his pocket, and says he wants to buy a \$6000.00 diamond

ring. B says he has one and places it on the counter. A looks at it and says "I will take it". C immediately steps up and attaches the ring to satisfy a judgment he has against A. B objects to C's taking of the ring. However, under the holding in the opinion in this case, title has passed to A upon his statement of "I will take it". Constructive delivery must have been made and B's only redress is against A for as to B, an action will lie against A. In the meantime, C walks off with all the property.

To then press the case further, as the facts in the case at bar indicate, we find in the preceding hypothetical proposition that A never really had an intention to buy the ring (as Goode had no intention to buy the drugs (p. 95) but only that he wanted Barnett to make a sale of it. Such were the facts in the case at bar.

The cardinal factor upon which the passing of title between buyer and seller depends is the intention of the parties. The property is transferred to the buyer at the time the parties intended it to be transferred. This intention is determined by the terms of the contract, the conduct of the parties and the circumstances of the case. *46 Am. Jur. 413.*

From the evidence presented, it is obvious the parties did not intend to sell narcotics on anything

but a cash basis. Also, Goode endeavored always to falsely inform Barnett that he (Goode) had a great sum of money, at least \$6000.00 on his person. Also, it is obvious that Goode never intended to buy the narcotics. He talked of buying the drugs for cash (p. 95) which was impossible and therefore we must gather he did not intend to buy them at all. He did not at any time speak of buying them on terms other than cash.

When the party who is trying to sustain a sale (Goode) readily admits he had no intention of buying the narcotics, then there is really no need of going into the question of delivery because there was not even a contract to sell, the buyer having never intended to buy.

Obviously, the courts have never gone so far before as Your Honors have in this opinion. The law of sales is the same for both criminal and civil matters and should be so interpreted by this court.

To return to the opinion heretofore rendered by this court, if there had been a delivery, this court would have hastened to say so. Unable to find the delivery, the court then makes law by saying that a constructive possession and delivery is enough. The court cited no cases holding that constructive pos-

session and delivery are sufficient in cases of this type, and appellant has been unable to find any. This court has cited with approval the cases of *Hammer vs. U. S.*, 249 F. 336; *Fisk vs. U. S.*, 279 F. 12, and *Reyff vs. U. S.* 2 F. (2d) 39, and *Ahearn vs. U. S.*, 3 F. (2d) 808. In every one of the cited cases the court has used strong language in holding that an actual delivery had been made or that a payment of money had been made to complete the sale.

No money was paid and no delivery was made in the instant case. The court says that the facts in the case coincide very closely with those in the Hammer case, *supra*. In the Hammer case the narcotics were delivered by Hammer to an express company in a package addressed to and consigned to the purchaser in another state. Nothing in the instant case even remotely resembles such a delivery. There is nothing similar about anything else in the case except that narcotics were involved.

The court in Note Two of the opinion cites Williston on Sales and two cases thereunder. It must be pointed out that the cases cited dealt with acceptance and delivery of goods in conjunction with sight drafts, bills of lading, written memoranda, and are not in point as far as cash transactions are concerned. The sections cited in Williston on Sales deal with accept-

ance of goods on credit transactions and define a delivery as a voluntary transfer of possession from one person to another. Nothing in Williston or his cited cases changes the law as announced by this court in the opinion where it says "the law appears quite clear that a sale of this character is not complete unless either the purchase price has been paid or the property delivered."

This court has not given effect to its own pronouncement of the law. Instead, it has announced a new law, without citing enough facts of the case to establish precedent, of constructive possession and delivery in cash sales. No authority was cited for such holding nor can any be found in any known law, cases, or authorities.

A further oral argument was presented the court to the effect that in a sale absolutely for cash, title does not pass until the case is paid, along with the delivery of the goods. *46 Am. Jur. Sec. 448; 46 Am. Jur. Sec. 477; The Canadian Northern Railway vs. Northern Mississippi Railway*, 209 Fed. 758; *Johnson vs. Iankonetz*, 110 Pac. 398; *Rowe vs. Spencer*, 79 S.E. 144; *Johnson-Brinkham Co. vs. Central Bank*, 22 S.W. 813.

Whether or not a transaction is for cash is based upon the intention of the parties and circumstances of

the case. If a set of facts ever demanded cash sale, then the set before us for our consideration demanded it. The talk of buyer and seller also indicated it. Without payment of cash, all conditions by the buyer had not been met and title did not pass from the buyer to the seller.

For the foregoing reasons and upon the authorities cited appellant respectively prays that the decision rendered in this case be reconsidered, or that a rehearing be granted to the end that this court may give proper interpretation to the law as laid down by the courts.

Respectfully submitted,

DAILEY & CONROY
Attorneys for Appellant
211 Stokes Building
Everett, Washington



No. 11956

United States
Court of Appeals

for the Ninth Circuit

SOUTHERN CALIFORNIA FISHERMAN'S
ASSOCIATION, W. S. OHIRA, KOTO
YAMAMOTO, M. IWASAKI, ROKU SEIKO,
BEN (BENKICHI) MAEDA, SEN TANAKA,
MIJOJI KAWASAKI, NAGA NOMURA,
YOSABURO HAMA, T. KOISO, T. NONO-
SHITA, JIM TEIZO HATASHITA and K.
NAKAMURA,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

Transcript of Record

Appeal from the United States District Court
for the Southern District of California
Central Division

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No. 11956

United States
Court of Appeals
for the Ninth Circuit

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ASSOCIATION, W. S. OHIRA, KOTO
YAMAMOTO, M. IWASAKI, ROKU SEIKO,
BEN (BENKICHI) MAEDA, SEN TANAKA,
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for the Southern District of California
Central Division

STUDY TO CLIMATE

1880-1881

1880-1881

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

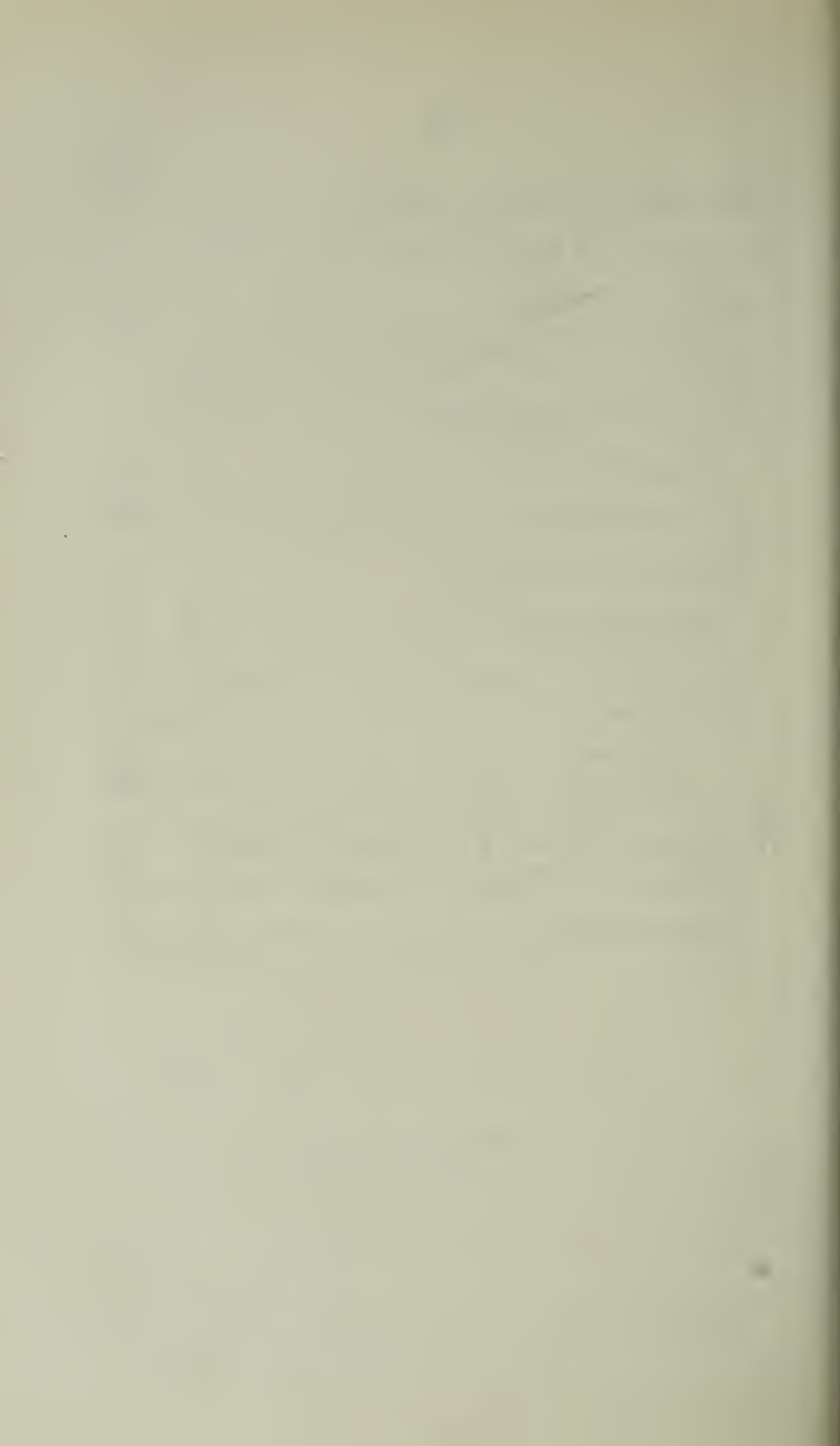
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NAMES AND ADDRESSES OF ATTORNEYS

For Appellants:

A. L. WIRIN,

FRED OKRAND,

257 S. Spring St.,

Los Angeles 12, Calif.

For Appellee:

JAMES M. CARTER,

United States Attorney,

GEORGE F. HURLEY,

Special Attorney, Lands Division,

Department of Justice,

600 U. S. Post Office and Court House

Bldg.,

Los Angeles 12, Calif. [1*]

*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 2078-H Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

FORTY ACRES OF LAND, MORE OR LESS,
SITUATE ON TERMINAL ISLAND IN
THE LOS ANGELES HARBOR, COUNTY
OF LOS ANGELES: TOGETHER WITH
CERTAIN PRIVATE LEASEHOLDS, PER-
MITS AND OTHER INTERESTS SUBOR-
DINATE TO THE CITY OF LOS ANGELES
AND THE BOARD OF HARBOR COMMIS-
SIONERS OF THE CITY OF LOS ANGE-
LES: CITY OF LOS ANGELES, a municipal
corporation; . . . SOUTHERN CALIFOR-
NIA JAPANESE FISHERMAN'S ASSO-
CIATION . . . W. S. O'HIRA . . . MRS. K.
YAMAMOTO . . . [2] T. KOISO . . . Y.
HAMA; N. NOMURA; . . . MRS. SEN TA-
NAKA; BEN MAEDA; . . . T. NONOSHITA;
JIM HATASHITA; K. NAKAMURA; . .
M. IWASAKI . . . M. SEIKO; . . . M. KA-
WASAKI . . . ,

Defendants.

AMENDED COMPLAINT IN
CONDEMNATION

The United States of America, the plaintiff, by
Wm. Fleet Palmer, United States Attorney, and

Irl D. Brett, Special Attorney, Lands Division, Department of Justice, as its attorney, on application of the Secretary of the Navy of the United States, and under direction of and by authority of the Attorney General of the United States, no defendant having been served, files as of course this its Amended Complaint, and for cause of action against the above named defendants, complains and alleges:

I.

Plaintiff, during all the times herein mentioned. was and now is a sovereign, empowered and authorized to acquire by purchase or the exercise of the power of Eminent Domain, any real or personal property or any interest therein, wherever situate within its jurisdiction, necessary for any public use or necessary for the future proper development and control of any public use, or for any purpose necessary to the due exercise of its power and the performance of its duties, including the acquisition of lands or interests therein for the establishment or development of Naval shore activities by the construction of temporary or permanent public works, including buildings, facilities, accessories and services, and such temporary and emergency construction or acquisition of buildings and facilities including the acquisition of land at localities inside the United States needed by the Navy as may be specifically approved by the Secretary of the Navy including the acquisition of additional facilities on Terminal Island at Los Angeles, Cali-

fornia, and for such other uses as may be authorized by Congress or by Executive Order.

II.

This is a suit of a civil nature, brought by the plaintiff under the authority of and pursuant to the provisions of an Act of Congress approved August 1, 1888 (25 Stat. 357), and acts amendatory thereof. [4]

III.

That plaintiff is a sovereign empowered and authorized to acquire, by purchase or the exercise of Eminent Domain, any real or personal property or any interest therein wherever situate within its jurisdiction, necessary for any public use or necessary for the proper development or control of any public use or for any purpose necessary for the due exercise of its power and the performance of its duties and particularly for national defense.

IV.

That by an Act of Congress approved December 17, 1941 (Public Law 353, 77th Congress, Chapter 591, First Session), entitled "Third Supplemental National Defense Appropriation Act, 1942," it is provided among other things, to wit:

"Title II—Navy Department
Bureau of Yards and Docks

Public Works, Bureau of Yards and Docks

Temporary and emergency construction: For temporary and emergency construction or acquisition of buildings and facilities, including

the acquisition of land, at localities inside and outside the United States, needed by the Navy, as may be specifically approved by the Secretary of the Navy, including collateral public works items, \$300,000.00. * * *''

That by an Act of Congress approved December 26, 1941 (Public Law 378, 77th Congress, Chapter 630, First Session), entitled "An Act to authorize the Secretary of the Navy to proceed with the construction of certain public works, and for other purposes," it is provided *inter alia*:

"There is hereby authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, \$310,000,000 for the establishment or development of naval shore activities by the construction of such temporary or permanent public works as the Secretary of the [5] Navy may consider necessary, including buildings, facilities, accessories, and services, with which shall be included the authority to acquire the necessary land * * *''

That the Secretary of the Navy has selected for acquisition by the United States of America, the interests in the lands hereinafter described and has designated that such interests in said lands are suitable and necessary for the purposes of the United States and particularly for the purposes defined in the above quoted Acts of Congress and said selection, designation and determination have been and now are in full force and effect.

That there are sufficient funds now available with which the plaintiff can and is authorized to pay just compensation for the land or interest in the land as sought to be taken and condemned herein in whatever sum may be ultimately awarded and adjudged in this proceeding as just compensation . . . [6]

VI.

That the purpose for which plaintiff is taking said interests in said land and the appurtenances thereto, and the improvements thereon, is necessary and constitutes a public use, and the use to which said property is to be applied is a use authorized by law; that the acquisition thereof by the plaintiff is and will be of greatest public benefit and to the least private injury; that plaintiff is informed and believes, and upon such ground alleges that none of said property has been heretofore appropriated to any public use; and if any part or portion thereof has been heretofore appropriated to a public use, the use for which it is herein sought to be condemned and appropriated is a more necessary and paramount public use.

VII.

That the Secretary of the Navy of the United States of America has executed and the plaintiff has filed in this Court a Declaration of Taking pursuant to the provisions of the Act of February 26, 1931 (46 Stat. 1421; Title 40, Sec. 258(a), U.S.C.A.), wherein and whereby said land hereinbefore described as Area 1 is taken for the use and

benefit of the United States of America as aforesaid; that with the filing of said Declaration of Taking, plaintiff has paid into the Registry of this Court, to the use of the persons entitled thereto, as the estimated just compensation for the taking of said Area 1, the sum of Three Hundred Thousand and no/100 Dollars (\$300,000.00).

VIII.

That in addition to the property hereinabove described and designated as Area 1, the Secretary of the Navy has selected and designated as suitable and necessary for the purposes of the United States, and as required in the furtherance of national defense, and it is necessary that plaintiff have and obtain the immediate and exclusive use and occupation of an area consisting of separate interests as hereinafter defined, which are herein defined in the aggregate as Area 2; that it is necessary that plaintiff have such immediate use [7] and occupation of all of Area 2 at the earliest practicable date for the removal, demolition and disposal of any and all structures now located thereon (unless expressly and subsequently excepted and allowed to be removed by the owners thereof by the Secretary of the Navy or his designated appointee and agent), and for the construction, installation and establishment upon the surface of the lands in which such interests are herein to be acquired of such necessary facilities, including temporary or permanent public works as the Secretary of the Navy may consider necessary for national defense,

together with the immediate and complete evacuation and removal of all persons now occupying or using the same or any portion thereof.

That said Area 2 is more particularly described as follows, to wit . . . (Hereafter follows the legal description of the various parcels.) [8]

IX.

Terminal Island, of which the land the plaintiff intends and seeks to take, acquire, condemn, hold, and own by this proceeding constitutes a part of an artificial island located in Los Angeles Harbor, above ordinary high-water mark, created by the deposit of soil and dredged material taken from the waters of Los Angeles Harbor to improve and increase the navigability of the channel thereof, and it was not in existence as an island at the time the State of California was admitted to the Union, and the area which the island now covers was and continued to be, until the creation of the island, submerged by the navigable waters of Los Angeles Harbor.

X.

That notices to vacate said premises and terminating such rights as the defendants in this action may have therein have been personally served upon each defendant and occupant of said premises who could be found thereat, or elsewhere located, and in the event such person or persons could not be located, has been served by posting a notice thereof upon the premises and mailing a copy of such notice to the last known address of such person, said notices being given by the City of Los Angeles, through its Board of Harbor Commissioners,

and by the Commandant of the Naval Operating Base on Terminal Island for and in behalf of the Secretary of the Navy. . . . [9]

XII.

The following persons, firms and corporations are named as defendants for the reason that they claim some right, title or interest in said parcels of land, the improvements thereon, or in the Orders, leases or Revocable Permits hereinbefore set forth in this Amended Complaint and the number in parenthesis after the name of defendant refers to the parcel hereinbefore mentioned in which said defendant claims an interest, viz:

. . . Southern California Jap Fishermen's Association (290); . . . [10] . . . O'Hira, W. S. (294); . . . Mrs. Koto Yamamoto (314); . . . M. Iwasaki (326); . . . M. Seiko (338); . . . Ben Maeda (354); Mrs. Sen Tanaka (355); M. Kawasaki (356); N. Nomura (357); Y. Hama (358); . . . T. Koiso (362); . . . T. Nonoshita (366); Jim T. Hatashita (365); K. Nakamura (368); . . . T. Koiso (373-A) . .

XIII.

Plaintiff has set forth in the caption of the Complaint the names of all of the persons whom it is informed and believes have or claim to have some right, title or interest in the parcels of land hereinbefore set forth and the Orders and Permits hereinbefore set forth and referred to in Parcels numbered 1 to 387, both inclusive, affected by this proceeding or some part thereof; that individual

persons whose true names are known to plaintiff have been sued under such names. Other defendants are sued under fictitious names of One Doe to Five Hundred Doe, inclusive. Corporations or unincorporated societies are indicated as such and corporations whose names are unknown are sued under fictitious names of One Doe Corporation to Five Hundred Doe Corporation, inclusive.

XIV.

Defendant County of Los Angeles was and now is a body politic and corporate situated in the State of California within the Southern District of California and was and now is organized and existing under the laws of the State of California. Defendants City of Los Angeles and City of Long Beach are municipal corporations, duly organized and existing under the laws of the State of California, Defendants Board of Harbor Commissioners, Board of Public Works, Bureau of Power and Light, and Los Angeles City School District are politic subdivisions or agencies of the City of Los Angeles. That defendants A Doe as administrator or executor of Z Doe as administrator or executor, are sued herein under fictitious names and are either executors or administrators of estates of decedents having some interest in or claim upon said property or some part thereof. That upon ascertaining said true names of the various defendants included herein under fictitious names, plaintiff prays leave of Court to amend the Complaint and substitute

said true names in lieu of the fictitious names herein used. [12]

Wherefore, plaintiff prays judgment:

1. That the Court ascertain and assess the value of the immediate, sole and exclusive possession of the property herein sought to be taken and condemned, and of each and every separate estate or interest therein.

2. Adjudging that the public uses for which plaintiff takes and condemns said land are necessary public uses of the plaintiff, and that the uses to which said property are to be applied are uses authorized by law and are paramount to any other public use or uses to which said land, or any portion thereof, is now appropriated;

3. Determining that the title in fee simple absolute to the lands set forth and described in Parcels 1 to 277, both inclusive, are now and at all times since the 21st day of February 1942, the date of the filing of the Declaration of Taking, have been vested in the United States of America subject to existing public utility easements, if any, and also subject to and excepting any and all oil and other mineral deposits underlying the land; Provided however, that the defendants or anyone acting in their behalf shall not explore, operate, drill or remove the said oil and other mineral deposits without the express written consent or permission of the United States of America prior thereto; and provided further that in excepting such oil and other mineral deposits and rights from its declara-

tion of taking in this action, the United States does not thereby concede said ownership or said rights to be in any of the defendants, or any other third party, nor shall it be prejudiced in hereafter asserting ownership to all rights in said oil and mineral deposits lying within and appertaining to the above described property by any lawful means whatsoever.

4. Vesting in the United States of America the immediate, sole and exclusive possession of the real property hereinabove described, and adjudging that said possessory interest shall be deemed to be condemned and taken for the use of the United States for the [13] purpose and use hereinabove set forth; and further adjudging that the right to just compensation for the possessory interests in the said lands hereinabove described be vested in the persons entitled thereto as their respective interests may appear and be established by judgment herein, and a time fixed within which, and the terms upon which, the parties in possession shall be required to surrender possession to plaintiff, United States of America.

5. That all liens or encumbrances of record against the property herein sought to be taken and condemned be satisfied out of the award to be made in this proceeding.

6. For such other and further relief as the Court deems meet and proper in the premises, and as the nature of the case may require.

Dated this 16th day of March, 1942.

WM. FLEET PALMER,
United States Attorney,

IRL D. BRETT,
ALEXANDER W. STAPLES,
Special Attorneys,
Lands Division,
Department of Justice,

By A. W. STAPLES,
Attorneys for Plaintiff.

[Endorsed]: Filed March 16, 1942. [14]

[Title of District Court and Cause.]

AFFIDAVIT

State of California,
County of Los Angeles—ss.

A. L. Wirin, being first duly sworn, deposes and says:

That he is the attorney for the defendant in the above case;

That he represents ten more clients in addition to the Southern California Fisherman's Association in the above action;

That he expects to file answers for each of these ten additional clients;

That it is agreed to and understood by the respective counsel that the same basis for valuation of property as will be decided at the proceedings on the hearing in the motion to strike in the above case will apply in the case of the answers to be filed on behalf of said ten additional clients; [15]

That the respective counsel have already previously stipulated that the plaintiff's Motion to Strike from Answer of Defendant Southern California Fisherman's Association be continued to April 29, 1946, at 10 a.m.

/s/ A. L. WIRIN.

Subscribed and sworn to before me this 13th day of April, 1946.

[Seal] /s/ FRANK F. CHUNIAS,
Notary Public in and for said County and State

[Endorsed]: Filed April 15, 1946. [16]

[Title of District Court and Cause.]

STIPULATION

(Parcel No. 290)

Comes Now plaintiff, United States of America, by and through its attorneys of record, Eugene D. Williams, Special Assistant to the Attorney General, and Reuben Rosensweig, Special Attorney, Lands Division, Department of Justice, and de-

fendant, Southern California Japanese Fishermen's Association, a corporation, by and through its attorneys of record, A. L. Wirin and J. B. Tietz, and stipulate to the following items hereinafter set forth:

1. That defendant occupied Parcel No. 290 under Revocable Permit No. 31, effective January 1, 1924, a copy of which Revocable Permit No. 31 is attached hereto and made a part hereof by reference and marked Exhibit "A."

2. Notice of Revocation on the above numbered parcel, a copy of which Notice is attached hereto marked Exhibit "B" and made a part hereof by reference, was served upon defendant Southern California Fishermen's [17] Association, a corporation, on February 14, 1942, at 11:05 a.m., by leaving a copy thereof with its Secretary.

3. That the Complaint in Condemnation was filed February 21, 1942.

4. That an Order for Immediate Possession was signed by the Honorable H. A. Hollzer, Judge of the above entitled Court, on February 25, 1942.

5. That a copy of the Order for Immediate Possession was served upon defendant, Southern California Japanese Fishermen's Association, a corporation, which order provided that defendant leave Terminal Island not later than midnight of February 27, 1942.

6. That as a result of the service of the Order for Immediate Possession defendant was unable to remove its improvements.

7. That said improvements are not now in place and as a result thereof are not being used or occupied by the United States Navy.

8. That defendant continuously occupied Parcel No. 290 from January 1, 1924, to and including February 27, 1942, and that the improvements erected thereon by defendant were subsequent to the granting of defendant's Revocable Permit No. 31 by the Board of Harbor Commissioners of the City of Los Angeles and prior to the service of the Notice of Revocation, a copy of which is attached hereto.

9. That the Notice of Revocation was served upon defendant, Southern California Japanese Fishermen's Association, a corporation, by the Board of Harbor Commissioners of the City of Los Angeles at the request of the United States Navy.

10. That the City of Los Angeles claims no interest in the improvements inasmuch as the just compensation for the taking of the right, title and interest of the City of Los Angeles has already been fixed and adjudicated by Final Judgment.

11. Plaintiff and defendant each reserves its right to appeal from any ruling of this Court as to any question of law and to seek a review in all appellate courts. [18]

Note: Plaintiff makes no objection to the inclusion of Items 6 and 9 within this Stipula-

tion hereinabove set forth but plaintiff specifically denies their legal relevancy and materiality herein.

Dated May 10th, 1946.

UNITED STATES
OF AMERICA,
EUGENE D. WILLIAMS,
Special Assistant to the
Attorney General,

REUBEN ROSENSWEIG,
Special Attorney,
Lands Division,
Department of Justice,

By /s/ REUBEN ROSENSWEIG,
Attorneys for Plaintiff.

SOUTHERN CALIFORNIA
JAPANESE FISHERMEN'S
ASSOCIATION, a corporation,

A. L. WIRIN and
J. B. TIETZ,

By /s/ A. L. WIRIN,
Attorneys for Defendant.

[Endorsed]: Filed May 13, 1946. [19]

At a stated term, to wit: the September Term A. D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held

at the Court Room thereof, in the City of Los Angeles on Wednesday, the 2nd day of October, in the year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

This cause coming on for trial; Reuben Rosensweig and George F. Hurley, Esqs., Special Attorneys, Lands Division, Department of Justice, appearing for the plaintiff; Fred Okrand, Esq., appearing as counsel for the defendant-owners of parcels 290, 326, 338, 354, 356, 357, 358, 362, 366, 367, 368, and three other unnumbered parcels owned by defendants H. Hamaguchi, Koto Yamamoto and Sen Tanaka, respectively:

Attorney Rosensweig moves the Court for a pre-trial hearing and determination of the rule of value which the Court would fix at the trial as to the improvements on the land, to govern the introduction of proof of the value of said improvements when the case is tried as to value. It is so ordered and counsel is directed to proceed with argument thereon.

Attorney Okrand argues thereon in behalf of the defendants and Attorney Rosensweig argues thereon in behalf of the plaintiff.

The Court states that it will adopt the decision of Judge Hollzer heretofore rendered in this action on the same point, and that the Court will rule at

the trial that the defendants are entitled only to the removal value of their improvements when the question arises during the introduction of proof of value.

It is further ordered that this cause be, and it hereby is, continued to 10 a.m., November 4, 1946, for re-setting for jury trial. [20]

At a stated term, to wit: the February Term, A. D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Thursday, the 21st day of August, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Jacob Weinberger,
District Judge.

[Title of Cause.]

The Court having this date received the written report of witness Ralph M. Hults, and the clerk having filed same as a trial exhibit, designated as Joint Exhibit No. 1 in evidence, pursuant to the stipulation and order made at the trial on August 12, 1947; now therefore, pursuant to the Court's decision and order for findings and judgment made on August 12, 1947,

The Court now finds the value of Parcel 373-A to be the sum of \$1,000 and now orders the findings

and judgment to be supplemented by the incorporation therein of the said findings as to Parcel 373-A. [21]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS
OF LAW

(As to Parcels Nos. 290, 294, 315, 326, 338, 354-358, inc., 362, 366-368 inc., and 373-A.)

This cause coming on to be heard before the Honorable Jacob Weinberger, Judge presiding, on August 12, 1947, for trial as to Parcels Nos. 290, 294, 314, 326, 338, 354, 355, 356, 357, 358, 362, 366, 367, 368 and 373-A, as the same are described in this action, plaintiff United States of America, being represented by James M. Carter, United States Attorney, and Reuben Rosensweig, Assistant United States Attorney, and George F. Hurley, Special Attorney, Lands Division, Department of Justice, and defendants hereinafter named, appearing by Wirin, Maeno & Okrand, by Fred Okrand, Esq., their attorneys, without the intervention of a jury, a jury being waived by the parties, and the said parties having stipulated and agreed in open Court that the Court could take evidence, but without prejudice to the right of either party to object to the relevancy thereof and the Court to rule thereon, (a) upon the value of the buildings and structures situated upon the property comprising the above parcels at the time of the taking thereof

by plaintiff in and by this action, then owned by defendants as removed from the land, and [22] (b) the value of said buildings and improvements as a part of the land, the Court proceeded to hear and receive the proofs of the parties and after having considered the evidence, both oral and documentary, and having heard arguments of counsel and being fully advised in the premises, makes the following

FINDINGS OF FACT

I.

That on February 21, 1942, the City of Los Angeles was the owner in fee of the real estate hereinafter described.

II.

That the defendants hereinafter named were, on and prior to February 21, 1942, in possession of the parcels hereinafter described, under Revocable Permits issued by the Board of Harbor Commissioners of the City of Los Angeles, which granted to said defendants the right to occupy and improve the property therein described under the terms hereinafter recited; that said defendants, and each of them, had been continuously in possession of their respective parcels for varying periods of time, no period of possession being for less than three (3) years; that said Revocable Permits each provided that the City could cancel the same upon giving to the occupant thereunder, notice to move therefrom after thirty (30) days from the date of such notice

and that all improvements placed upon the property by said permittees remained the property of said permittee and could be removed by such permittee at any time during the 30-day period following the service of such cancellation notice.

III.

That pursuant to such permits the hereinafter named defendants constructed upon and securely attached to the property described in said permits, buildings and structures of a substantial nature; and that said buildings and structures were the sole property of said defendants, subject, however, in cases hereinafter described, to liens of the State Board of Equalization of California for occupational license fees due under California law for the conduct of certain forms of business therein.

IV.

That on various dates, none of which was more remote than thirty [23] (30) days prior to February 21, 1942, the City of Los Angeles cancelled the Revocable Permits issued to the hereinafter named defendants, for each of the above numbered parcels; that on February 21, 1942, this action was filed in this Court and cause, and pursuant to an Order of this Court first had and obtained, the United States entered upon said parcels and each of them, took the exclusive possession thereof and of all buildings and structures thereon and removed the defendants forthwith from the premises although in no case had the 30-day period within

which said defendants could remove their buildings and structures and improvements expired.

V.

That notice of revocation of the permits was served upon defendants by the City of Los Angeles at the request of the United States Navy just prior to the filing of this suit; and these condemnation proceedings were instituted at the request of the United States Navy.

VI.

That the fair market value of the buildings and structures taken from defendants named below (a) as removed from the land, and (b) as a part of the land, is as shown in the following table:

Defendants	Parcel No.	Value as Removed from the Land	Value as a Part of the land
So. Calif. Fisherman's Assn.	290	\$1,650	\$4,800
W. S. O'Hira	294	350	1,050
Yamamoto, Koto	314	2,250	8,750
Iwasaki, M.	326	200	1,000
Seiko, Roku	338	300	1,350
Maeda, Ban (Benkiehi).....	354	600	3,000
Tanaka, Sen	355	400	1,100
Kawasaki, Miyoji	356	600	3,500
Nomura, Naga	357	350	2,700
Hama, Yosaburo	358	500	2,900
Koiso, T.	362	350	1,950
Nonoshita, T.	366	300	850
Hatashita, Jim Teizo.....	367	700	3,250
Nakamura, K.	368	500	1,400
Koiso, T.	373-A	1,000	1,650

CONCLUSIONS OF LAW

I.

That the defendants named in Findings of Fact VI, were the lawful owners of the buildings and

structures situate upon each of the hereinabove numbered parcels on February 21, 1942, when the United States took possession thereof and removed the said owners from said parcels and that said defendants are the only persons entitled to receive the award of compensation for the condemnation and taking of said buildings and structures by plaintiff, except as hereinafter noted.

II.

That the buildings and structures were of such construction that had they been constructed by the owner of the fee they would have been a part of the real property.

III.

That the legal effect of the Revocable Permits was to create a tenancy at the will of the owner City of Los Angeles in each parcel above identified, but subject to a 30-day occupancy after termination for the purpose of removing all buildings and structures and property of the tenant therefrom; that the legal effect of the notice of cancellation given by the City of Los Angeles to the permittees thereon was to terminate the tenancy at will and to create a tenancy for thirty (30) days for the purpose of removal as aforesaid and that the legal effect of the condemnation and taking of the interests of the defendants was to condemn and take the unexpired balance of said 30-day term and all of the buildings and structures of defendants

situate upon said property and that the defendants are entitled to just compensation therefor. [25]

IV.

That the unexpired balance of the 30-day term condemned and taken by the United States, had no value and that the defendants are not entitled to compensation therefor.

V.

That the proper measure of evaluating the buildings and structures for the purpose of determining and fixing the just compensation to be paid to the defendants, as the former owners, for the condemnation and taking thereof, is their value as removed from the land and that the said defendants are, therefore, entitled to judgment of an award of just compensation equal to the value of the said buildings and structures on February 21, 1942, as they would have been worth to said owners if they had been able to remove them from the land, less whatever amounts may be due on the liens of the State Board of Equalization of California as the same may be proved by the said Board upon distribution proceedings subsequent to entry of Judgment, which liens are claims to the award, paramount and superior to the rights of defend-

ants to receive the same when so established to exist against any of the defendants.

Dated this 9th day of April, 1948.

/s/ JACOB WEINBERGER,
United States District Judge.

Approved as to Form and Substance:

UNITED STATES
OF AMERICA,

JAMES M. CARTER,
United States Attorney,

GEORGE F. HURLEY,
Special Attorney,
Lands Division,
Department of Justice,

By /s/ GEORGE F. HURLEY,
Attorneys for Plaintiff.

Approved as to Form but not as to Substance:

WIRIN, MAENO & OKRAND,

By /s/ FRED OKRAND,
Attorneys for Defendants.

[Endorsed]: Filed April 13, 1948. [26]

In the District Court of the United States in and
for the Southern District of California, Central
Division

No. 2078-W Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND IN LOS ANGELES
COUNTY, et al.,

Defendants.

JUDGMENT AND DECREE IN
CONDEMNATION

(As to Parcels Nos. 290, 294, 315, 326, 338, 354-
358 inc., 362, 366-368 inc., and 373-A.)

The above entitled cause having come on for trial on August 12, 1947, plaintiff United States of America being represented by James M. Carter, United States Attorney, and George F. Hurley, Special Attorney, Lands Division, Department of Justice, and Wirin, Maeno & Okrand, by Fred Okrand, Esq., representing the defendants who are the parties interested in the hereinafter described property, and the Court having heard and received both oral and documentary evidence and made its Findings of Fact and Conclusions of Law which have been filed by the Court in this action, the Court now renders Judgment as follows:

I.

That just compensation for the condemnation and taking by the United States of the buildings and structures located upon the following parcels as the same are described in this action, is as follows: [27]

Parcel No.	Just Compensation
290	\$1,650
294	350
314	2,250
326	200
338	300
354	600
355	400
356	600
357	350
358	500
362	350
366	300
367	700
368	500
373-A	1,000

II.

That the following named defendants each being the owner of the parcel, the number of which is set opposite his name, have Judgment against the United States in the amount set out below:

Parcel No.	Owner	Amt. of Judgment
290	So. Calif. Fisherman's Assn.....	\$1,650
294	W. S. O'Hira	350
314	Yamamoto, Koto	2,250
326	Iwasaki, M.	200

Parcel No.	Owner	Amt. of Judgment
338	Seiko, Roku	300
354	Maeda, Ben (Benkichi).....	600
355	Tanaka, Sen	400
356	Kawasaki, Miyoji	600
357	Nomura, Naga	350
358	Hama, Yosaburo	500
362	Koiso, T.	350
366	Nonoshita, T.	300
367	Hatashita, Jim Teizo.....	700
368	Nakamura, K.	800
373-A	Koiso, To.	1,000

less whatever amounts may be due to the liens of the State Board of Equalization of California as the same may be proved by the said Board upon distribution proceedings subsequent to entry of this Judgment, which liens are claims to the award, paramount and superior to the rights of defendants to receive the same when so established to exist against any of the defendants.

III.

That with respect to the above numbered parcels, deficiencies exist resulting from the fact that the Judgment herein awarded is greater than the amount on deposit in the registry of this Court to pay the same. With respect to each such parcel, plaintiff shall forthwith deposit in the registry of this Court an amount sufficient to supply the deficiency, together with interest upon the amount of such deficiency at the rate of six (6%) per cent per annum from February 21, 1942, to the date of such deposit and defendants, being the owners of said parcels, shall have Judgment for interest upon such deficiency at six (6%) per cent per annum as aforesaid, and the amount now on deposit with re-

spect to such parcels and such defendants, shall forthwith be paid to them in partial satisfaction of this Judgment, less any amount that may be due on the liens of the State Board of Equalization of California as the same may be proved by the said Board upon distribution proceedings subsequent to entry of this Judgment, which liens are claims to the award, paramount and superior to the rights of defendants to receive the same when so established to exist against any of the defendants.

Dated this 13th day of April, 1948.

/s/ JACOB WEINBERGER,
United States District Judge.

Presented by:

JAMES M. CARTER,
United States Attorney,

GEORGE F. HURLEY,
Special Attorney,
Lands Division,
Department of Justice,

By /s/ GEORGE F. HURLEY,
Attorneys for Plaintiff.

Judgment entered April 13, 1948. Docketed April 13, 1948. Book 50, Page 160, Edmund L. Smith, Clerk, by L. B. Figg, Deputy.

[Endorsed]: Filed April 13, 1948. [29]

[Title of District Court and Cause.]

NOTICE OF APPEAL

(As to Parcels Nos. 290, 294, 315, 326, 338, 354-358 inc., 362, 366-368 inc., and 373-A.)

Notice Is Hereby Given that Southern California Fisherman's Association, W. S. O'Hira, Koto Yamamoto, M. Iwasaki, Roku Seiko, Ben (Benkichi) Maeda, Sen Tanaka, Miyoji Kawasaki, Naga Nomura, Yosaburo Hama, T. Koiso, T. Nonoshita, Jim Teizo Hatashita, and K. Nakamura, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final judgment entered in this action on April 13, 1948.

Dated this 22nd day of May, 1948.

A. L. WIRIN and
FRED OKRAND,

By /s/ FRED OKRAND,

Attorneys for Defendants and Appellants Southern California Fisherman's Assn., W. S. O'Hira, Koto Yamamoto, M. Iwasaki, Roku Seiko, Ben (Benkichi) Maeda, Sen Tanaka, Miyoji Yawasaki, Naga Nomura, Yosabura Hama, T. Koiso, T. Nonoshita, Jim Teizo Hatashita, K. Nakamura.

(Acknowledgment of service by mail attached.)

[Endorsed]: Filed May 24, 1948. [31]

[Title of District Court and Cause.]

STIPULATION RE DESIGNATION OF RECORD ON APPEAL AND PRAECIPE

(As to Parcels Nos. 290, 294, 315, 326, 338, 354-358 inc., 362, 366-368 inc., and 373-A.)

It Is Hereby Stipulated, pursuant to Rule 75(f), Federal Rules of Civil Procedure, between the attorneys for the parties in the above entitled action that the following shall be the record on appeal, and the Clerk is requested to prepare and certify the same to the Circuit Court of Appeals for the Ninth Circuit:

1. Complaint, abridged in accordance with Rule 75(e), Federal Rules of Civil Procedure, as per attached copy.
2. Affidavit of A. L. Wirin, filed April 15, 1946.
3. Stipulation filed May 13, 1946.
4. Order of Hon. Jacob Weinberger of October 2, 1946.
5. Order of Hon. Jacob Weinberger of August 21, 1947.
6. Findings of fact and conclusions of law filed April 13, 1948. [33]
7. Judgment and decree filed April 13, 1948.
8. Notice of appeal.
9. This stipulation and praecipe.

It Is Further Stipulated that the original of Ex-

hibit 1, filed on August 21, 1947, be transmitted and certified to the Appellate Court.

Dated this 21st day of May, 1948.

A. L. WIRIN and
FRED OKRAND,

By /s/ FRED OKRAND,

Attorneys for Defendants and Appellants Southern California Fisherman's Assn., W. S. O'Hira, Koto Yamamoto, M. Iwasaki, Roku Seiko, Ben (Benkichi) Maeda, Sen Tanaka, Miyoji Kawasaki, Naga Nomura, Yosaburo Hama, T. Koiso, T. Nonoshita, Jim Heizo Hatashita, K. Nakamura.

JAMES M. CARTER,

U. S. Attorney,

GEORGE F. HURLEY,

Special Attorney,

Lands Division,

Department of Justice,

By /s/ GEORGE F. HURLEY,

Attorneys for Plaintiff and Appellee.

It is ordered that the Clerk shall transmit original of Exhibit No. 1 to the Appellate Court.

Dated May 24, 1948.

JACOB WEINBERGER,

Judge.

Note: The amended complaint attached hereto appears at page 2 of the certified transcript so is not repeated at this point.

[Endorsed]: Filed May 24, 1948. [34]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 34, inclusive, contain full, true and correct copies of a portion of the Amended Complaint; Affidavit of A. L. Wirin · Stipulation re Parcel No. 290; Minute Orders entered October 2, 1946, and August 21, 1947; Findings of Fact and Conclusions of Law; Judgment and Decree in Condemnation; Notice of Appeal and Stipulation and Order re Designation of Record on Appeal which, together with original Joint Exhibit No. 1, transmitted herewith, constitute the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing comparing, correcting and certifying the foregoing record amount to \$7.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 14th day of June, A. D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

JOINT EXHIBIT No. 1

Ralph M. Hults
100 Club Road, Pasadena, California
Ryan 1-6880
Member American Institute of Real Estate
Appraisers

August 19, 1947

The Honorable Jacob Weinberger
U. S. District Judge
Post Office Building
Los Angeles 12, California

Re: U. S. vs. 40 acres of land, City of Los Angeles, County of Los Angeles et al., No. 2078-W, Parcels 290, 294, 314, 326, 338, 354, 355, 356, 357, 358, 362, 366, 367, 368, and 373-A.

Dear Judge Weinberger:

Pursuant to your request I submit herewith in duplicate the findings from appraisal reports submitted by me to the Lands Division, U. S. Department of Justice, in which was expressed an opinion of the fair market value and of the removal or salvage value of the improvements located on the above-numbered parcels as of February 21, 1942.

PARCEL No. 290

Owner of Improvements: Southern California Japanese Fishermen's Association.

* * * *

Lease: Revocable Permit No. 31—effective January 1, 1924.

Joint Exhibit No. 1—(Continued)

Terms: 30 days.

Area of Land: 13,000 square feet.

Ground Rental: \$50.00 per month.

Street Address: 243 Terminal Way.

Assessed Value of Improvements: \$880.

Valuation of Improvements in Place: \$4,800.

Removal or Salvage Value of Improvements:
\$1,650.

Description of Improvements: The improvements on this parcel consist of a frame hall, a frame cottage, a frame garage, a shed, and a toilet building.

Association Hall

Exterior construction—lap siding, with cheap composition roof in good condition, and cement foundation.

Interior finish—4 rooms, 2 toilets, and a small mezzanine room for a motion picture projector. Walls are board and batt 4 feet high; balance of wall and ceilings are tongue and groove siding. Large room has maple floor; balance of floors are 1 by 4-inch tongue and groove. Toilet rooms have plywood walls and ceilings and cement floor.

One toilet room has a low-tank toilet and a wall lavatory, and the other has 2 low-tank toilets and a wall lavatory.

One room, 12 by 32 feet, has unfinished walls and ceiling and 1 by 4-inch tongue and groove floor.

Area: 4,198 square feet.

Condition: Good.

Age: 25 years.

Joint Exhibit No. 1—(Continued)

Frame Cottage

Exterior construction—6-inch lap siding, composition roof, and woodsill foundation.

Interior—6 rooms—beaded tongue and groove walls and ceilings, 1 by 4-inch tongue and groove floors. Porcelain sink and wooden drainboard. Three fixtures in the bath—Essex tub, wall lavatory, low-tank toilet.

Area: 1,168 square feet.

Age: 22 years.

Condition: Good.

Frame Garage

Constructed of boards and batts, with tar paper roof, and board floor.

Area: 186 square feet.

Frame Shed

Constructed of lap siding, with composition roof and woodsill foundation. 1 by 6-inch Oregon pine floor.

Area: 65 square feet.

Toilet Building

Constructed of lap siding, with composition roof and cement foundation, containing 4 low-tank toilets.

Area: 125 square feet.

PARCEL No. 294

Owner of Improvements: W. S. O'Hira.

* * * *

Lease: Revocable Permit No. 48—effective February 18, 1925.

Joint Exhibit No. 1—(Continued)

Term: 30 days.

Area of Land: 795 square feet.

Ground Rental: \$10.00 per month.

Street Address: 502 South Seaside Avenue.

Assessed Value of Improvements: \$200.

Value of Improvements in Place: \$1,050.

Removal or Salvage Value of Improvements:
\$350.

Description of Improvements:

Frame Office Building

Exterior construction—novelty siding, with sheet composition roof, and woodsill foundation on cement piers.

Interior—consists of 4 rooms—plastered walls and ceilings, and Oregon pine and linoleum floors.

Two porcelain sinks with wooden drainboards.
Low-tank toilet.

Area: 682 square feet.

Age: 17 years.

Condition: Fairly good.

PARCEL No. 314

Owner of Improvements: Mrs. Koto Yamamoto.

* * * *

Lease: Revocable Permit No. 243—effective April 1, 1932.

Term: 30 days.

Area of Land: 10,000 square feet.

Ground Rental: \$65.00 per month.

Joint Exhibit No. 1—(Continued)

Street Address: 248, 248½, 250, 250½, 252, 252½ Terminal Way, and 213 Ways Street, 254 Terminal Way.

Assessed Value of Improvements: \$1,100.

Valuation of Improvements in Place: \$8,750.

Removal or Salvage Value of Improvements: \$2,250.

Description of Improvements: The improvements on this parcel consist of a single frame house, three double frame houses, a corrugated iron bunk house and frame garage.

Single House

Exterior construction—lap siding, wood shingle roof and cement foundation.

Interior finish—5 rooms, bath and service porch. Living and dining rooms have plastered walls and ceilings with walls papered.

Kitchen has beaded tongue and groove walls and ceiling.

Two bedrooms plasterboard and battens walls and ceilings.

One bedroom plasterboard walls and beaded tongue and groove ceiling.

Kitchen has enamel sink and tile drainboard, hot water heater.

Bath has three fixtures, Essex tub, wall lavatory and low-tank toilet.

Double laundry tray on screened porch.

Wiring in conduit, lighting fixtures fairly good.

Joint Exhibit No. 1—(Continued)

Age: 19 years.

Area: 1,040 square feet.

Condition: Fairly good.

Three Double Houses

Exterior construction—lap siding, sheet composition roofs, woodsill foundation.

Interior finish—beaded tongue and groove walls and ceilings (double construction), 1 by 4 tongue and groove floors.

The three double houses contained the following: 19 rooms, 6 baths, 4 service porches, 6 enamel sinks and wooden drainboards, 6 hot water heaters, 6 Essex tubs, 6 low-tank toilets, 6 wall lavatories.

Wiring in conduit, drop cords only.

Age: 17 years.

Area: 3,094 square feet.

Condition: Fairly good.

Corrugated Iron Bunk House

Exterior construction—frame with corrugated iron sides and roof, with the exception of a 10 by 16-foot addition on the west, which has 6-inch siding with sheet composition roof, woodsill foundation.

Interior finish—seven rooms, six on first floor and one dormer type room upstairs.

1 by 4 tongue and groove walls, novelty type beaded tongue and groove ceilings, with the exception of two rooms, which have three walls and ceilings of plyboard. Floors 1 by 10 and 1 by 12 Oregon pine.

Two enamel sinks.

Joint Exhibit No. 1—(Continued)

Bath has cement floor, low-tank toilet and Essex tub. Laundry tray in small room.

Dormer type room upstairs unfinished except for flooring.

Wiring in conduit—drop cords only.

Age: 19 years.

Area: 1,030 square feet.

Condition: Good.

Single Garage

Constructed of lap siding, tar paper roof and dirt floor.

Age: 12 years.

Area: 188 square feet.

Condition: Good.

PARCEL No. 326

Owner of Improvements: M. Iwasaki.

* * * *

Lease: Revocable Permit No. 140—effective July 1, 1929.

Term: 30 days.

Area of Land: 1,250 square feet.

Ground Rental: \$15.63 per month.

Street Address: 617 Tuna Street.

Assessed Value of Improvements: \$140.

Valuation of Improvements in Place: \$1,000.

Removal or Salvage Value of Improvements: \$200.

Description of Improvements: The improvements on this parcel consist of a one-story frame store building with living quarters in the rear.

Joint Exhibit No. 1—(Continued)

Exterior construction—lap siding with low pitch composition roof, brick foundation and glass front in the store.

Interior finish—beaded tongue and groove walls and ceilings (single construction) and 1 by 4-inch tongue and groove floors, linoleum covered. Wiring in conduit, drop cords only—no fixtures.

Front room—barber shop—had two wall lavatories and two cupboards.

Living quarters—four rooms and bath—beaded tongue and groove walls and ceilings, 1 by 4-inch tongue and groove floors, with cement floor in bathroom. Bath had galvanized iron oval tub, one laundry tray and low-tank toilet.

Age: 24 years.

Area: 955 square feet.

Condition: Fairly good.

PARCEL No. 338

Owner of Improvements: M. Seiko.

* * * *

Lease: Revocable Permit No. 161—effective May 1, 1930.

Term: 30 days.

Area of Land: 915 square feet.

Ground Rental: \$20.00 per month.

Street Address: 618 South Seaside Avenue.

Assessed Value of Improvements: \$110.

Valuation of Improvements in Place: \$1,350.

Removal or Salvage Value of Improvements: \$300.

Joint Exhibit No. 1—(Continued)

Description of Improvements: The improvements on this parcel consist of a two-story frame building.

Exterior construction—novelty siding, composition roof and cement foundation.

Interior finish—containing seven rooms and two baths—2 rooms and toilet downstairs and 5 rooms and bath upstairs.

One small room utilized as barber shop has beaded tongue and groove walls and ceiling, tongue and groove floor linoleum covered, also wall lavatory.

One room has plasterboard walls and beaded tongue and groove ceiling, 1 by 4-inch tongue and groove floor, high-tank toilet and wall lavatory.

Five rooms upstairs—plasterboard walls and ceilings (double construction) with three partitions of beaded tongue and groove. Oregon pine floors linoleum covered.

Enamel sink and wooden drainboard in one room. Bathroom has oval galvanized iron bath tub and high-tank toilet.

Wiring in conduit, drop cords only.

Stairway on outside of the building.

Age: 24 years.

Area: 1,647 square feet.

Condition: Poor. The building has been patched up and there is considerable evidence of dry rot.

PARCEL No. 354

Owner of Improvements: Ben Maeda.

* * * *

Lease: Revocable Permit No. 451—effective October 1, 1938.

Joint Exhibit No. 1—(Continued)

Term: 30 days

Area of Land: 1,200 square feet.

Ground Rental: \$18.00 per month.

Street Address: 721 Tuna Street.

Assessed Value of Improvements: \$630.

Valuation of Improvements in Place: \$3,000.

Removal or Salvage Value of Improvements:
\$600.

Description of Improvements: This parcel is improved with a two-story frame building with a stucco front.

Exterior construction—sides and front are of lap siding, front wall is of stucco; medium pitch sheet composition roof in good condition, and cement foundation.

Interior—consists of one large and three small rooms, toilet and lavatory. Interior stucco on the walls and ceiling; floor is cement, linoleum covered.

Good low-tank toilet and wall lavatory in the bathroom. Double galvanized iron sink and drain-board and another large enamel sink and tile drain-board. Large Wellsbach Hot Zone hot water heater.

Upstairs consists of six rooms and bath. Plaster-board walls and ceiling in half of the hall and in two rooms. Balance of the hall and other four rooms have beaded tongue and groove walls and ceilings. Floors are 1 by 4-inch tongue and groove Oregon pine, linoleum covered.

Bathroom has tile floor, plaster walls and ceiling, standard bath tub, low-tank toilet, and heavy wall lavatory.

Joint Exhibit No. 1—(Continued)

Area: First floor, 1,166 square feet; second floor, 937 square feet; total area, 2,103 square feet.

Age: 22 years; additions in 1930 and 1935.

Condition: Good.

PARCEL No. 355

Owner of Improvements: Mrs. Sen Tanaka.

* * * *

Lease: Revocable Permit No. 408—effective October 26, 1936.

Term: 30 days.

Area of Land: 1,000 square feet.

Ground Rental: \$12.50 per month.

Street Address: 729 Tuna Street.

Assessed Value of Improvements: \$140.

Valuation of Improvements in Place: \$1,100.

Removal or Salvage Value of Improvements: \$400.

Description of Improvements: This parcel is improved with a frame one-story building.

Exterior construction—lap siding, medium pitch tar paper roof in poor condition, and cement foundation.

Interior—consists of four rooms. Walls and ceilings are beaded tongue and groove; 1 by 4-inch tongue and groove floors. The two rear rooms are on a level 2 feet higher than the two front rooms.

There is an enamel sink and a wooden drain-board, also a high-tank toilet and a wall lavatory.

Joint Exhibit No. 1—(Continued)

Additional wall lavatory and galvanized hot water heater in another room.

Age: 19 years.

Area: 873 square feet.

Condition: Fairly good, excepting the roof, which is poor.

PARCEL No. 356

Owner of Improvements: M. Kawasaki.

* * * *

Lease: Revocable Permit No. 435—effective October 1, 1937.

Term: 30 days.

Area of Land: 1,600 square feet.

Ground Rental: \$20.00 per month.

Street Address: 737 Tuna Street.

Assessed Value of Improvements: \$560.

Valuation of Improvements in Place: \$3,500.

Removal or Salvage Value of Improvements: \$600.

Description of Improvements: This parcel is improved with a two-story frame building.

Exterior construction—lap siding, medium pitch composition roof in good condition, and cement foundation.

Interior: The downstairs contains two rooms; walls and ceilings are beaded tongue and groove and floors are 1 by 4-inch tongue and groove. There is a low-tank toilet and a corner wall lavatory in one of the rooms.

Upstairs contains seven rooms, a bathroom, and

Joint Exhibit No. 1—(Continued)

a laundry room. Walls and ceilings are beaded tongue and groove, and floors are 1 by 4-inch tongue and groove, with linoleum in two rooms, and carpeting in the remainder. Bathroom has cement floor.

Bathroom has low-tank toilet, corner wall lavatory, and galvanized iron bath tub. There is also an extra toilet room, with cement floor, which has a low wooden tank toilet.

Laundry room has a cast cement laundry tray and a galvanized iron hot water heater.

Age: 21 years; front was remodeled in 1937.

Area: First floor, 1,488 square feet; second floor, 1,373 square feet; total area, 2,861 square feet.

Condition: Good for age.

PARCEL No. 357

Owner of Improvements: N. Nomura.

* * * *

Lease: Revocable Permit No. 353—effective February 24, 1935.

Term: 30 days.

Area of Land: 1,200 square feet.

Ground Rental: \$20.00 per month.

Street Address: 743 Tuna Street.

Assessed Value of Improvements: \$370.

Valuation of Improvements in Place: \$2,700.

Removal or Salvage Value of Improvements: \$350.

Description of Improvements: This parcel is im-

Joint Exhibit No. 1—(Continued)

proved with a two-story frame building with a store on the first floor and living quarters above.

Exterior Construction: Lap siding, with medium pitch tar paper roof in poor condition, and cement floor.

Interior: The first floor consists of one room and a toilet room; walls and ceilings are plasterboard and batts; floor is cement.

There is a double galvanized iron sink and drain-board, all in one piece. Toilet room contains low-tank toilet and wall lavatory.

The upstairs contains five rooms and a bath. Walls and ceilings are plasterboard, and floors are tongue and groove, linoleum covered. Floor in the bathroom is cement.

Bathroom has a low-tank toilet, standard bath tub; there is a 30-gallon hot water heater on the rear porch.

Area: First floor, 894 square feet; second floor, 696 square feet; total area, 1,590 square feet.

Age: 13 years.

Condition: Good.

PARCEL No. 358

Owner of Improvements: Y. Hama.

* * * *

Lease: Revocable Permit No. 449—effective October 2, 1938.

Term: 30 days.

Area of Land: 1,600 square feet.

Joint Exhibit No. 1—(Continued)

Ground Rental: \$20.00 per month.

Street Address: 749 Tuna Street.

Assessed Value of Improvements: \$410.

Valuation of Improvements in Place: \$2,900.

Removal or Salvage Value of Improvements: \$500.

Description of Improvements: This parcel is improved with a two-story frame building with a mezzanine floor.

Exterior construction—lap siding, composition roof, and cement floor.

Interior: There are two rooms on the ground floor, and a toilet and wall lavatory. Walls and ceilings are beaded tongue and groove; floor in one room is 1 by 4-inch tongue and groove; the other room has cement floor. There is eleven feet of partitioned shelving 10 feet high, for nails, etc. (Building was being utilized as a hardware store.)

There is a toilet and a wall lavatory in a separate room which has a cement floor.

Building has a mezzanine, containing 922 square feet, divided into two rooms. Walls and ceilings are beaded tongue and groove; floors are 1 by 4-inch tongue and groove. There is about 30 feet of shelving in the mezzanine.

Living quarters in the rear upstairs consist of four rooms and a bath. Walls and ceilings are plasterboard; floors are 1 by 4-inch tongue and groove, linoleum covered, with exception of that in the bathroom, which is cement.

Joint Exhibit No. 1—(Continued)

Bathroom has three fixtures—low-tank toilet, bath tub, and corner wall lavatory. There is an enamel sink and a wooden drainboard and galvanized iron hot water heater in the kitchen.

Area: First floor, 1,566 square feet; second floor, 650 square feet; mezzanine, 922 square feet; total area, 3,138 square feet.

Average Age: About 16 years.

Condition: Fair.

PARCEL No. 362

Owner of Improvements: T. Koiso.

* * * * *

Lease: Revocable Permit No. 450—effective October 1, 1938.

Term: 30 days.

Area of Land: 800 square feet.

Ground Rental: \$10.00 per month.

Street Address: 779 Tuna Street.

Assessed Value of Improvements: \$230.

Valuation of Improvements in Place: \$1,950.

Removal or Salvage Value of Improvements: \$350.

Description of Improvements: This parcel is improved with a two-story frame and corrugated iron building, having a store on the first floor and living quarters above.

Exterior Construction: The front wall of the building is frame, and the sides and rear wall are corrugated iron; composition roof and cement foundation.

Joint Exhibit No. 1—(Continued)

Interior: The first floor contains two rooms; walls and ceilings are beaded tongue and groove, and floors are 1 by 4-inch tongue and groove.

There is cheap shelving 7 feet high on three sides of the main room. One room contains an enamel sink and a wooden drainboard.

The second story contains five rooms and a bath; walls and ceilings are beaded tongue and groove, and floors are 1 by 4-inch tongue and groove with fair linoleum in three rooms. One room contains an enamel sink and wooden drainboard.

There is a low-tank toilet in a separate room, which has a cement floor. There is also a hot water heater and a cast laundry tray on a service porch which has a cement floor.

Average Age: 20 years.

Area: First floor, 759 square feet; second floor, 697 square feet; total area, 1,456 square feet.

Condition: Fair.

PARCEL No. 366

Owner of Improvements: T. Nonoshita.

* * * *

Lease: Revocable Permit No. 357—effective February 1, 1935.

Term: 30 days.

Area of Land: 1,200 square feet.

Ground Rental: \$15.00 per month.

Street Address: 718 Tuna Street.

Assessed Value of Improvements: \$140.

Joint Exhibit No. 1—(Continued)

Valuation of Improvements in Place: \$850.

Removal or Salvage Value of Improvements:
\$300.

Description of Improvements: This parcel is improved with a one-story frame store building.

Exterior Construction: Lap siding, fairly new composition roof, and cement foundation.

Interior: This building contains four rooms. The front room, 20 by 30 feet, has beaded tongue and groove walls and ceiling, and cement floor. There is a counter and seven stools in this room.

The three rear rooms are on an elevation 18 inches higher than the front room, and have beaded tongue and groove walls and ceilings, and 1 by 4-inch tongue and groove floors. The floor in one room is linoleum covered.

Bathroom contains a tub and low-tank toilet. There is also a large galvanized iron sink and a galvanized iron hot water heater in one room.

Area: 1,006 square feet.

Age: 22 years; alterations in 1930.

Condition: Poor to fair.

PARCEL No. 367

Owner of Improvements: Jim T. Hatashita.

* * * *

Lease: Revocable Permit No. 402—effective July 1, 1936.

Term: 30 days.

Area of Land: 1,800 square feet.

Joint Exhibit No. 1—(Continued)

Ground Rental: \$22.50 per month.

Street Address: 726-30 Tuna Street.

Assessed Value of Improvements: \$980.

Valuation of Improvements in Place: \$3,250.

Removal or Salvage Value of Improvements: \$700.

Description of Improvements: This parcel is improved with a part one-story and part two-story frame building with a stucco front.

Exterior construction: Frame lap siding on the side and rear walls of the first floor; stucco front, and portion of side walls on the second story are stucco. Low pitch tar paper roof in fair condition; cement foundation.

Interior: The first floor has four rooms; one large room has plasterboard walls and ceiling and 1 by 4-inch tongue and groove floors. One small room has plyboard walls and ceiling and pine floor, linoleum covered. Two rear rooms have beaded tongue and groove walls and ceiling with Oregon pine and linoleum floor.

There is an enamel sink in one room and a toilet, wall lavatory, and hot water heater in another room.

The second story contains three rooms, bath, and toilet. Walls and ceilings are plyboard, and floors are 1 by 4-inch tongue and groove.

Bathroom has galvanized iron bath tub and a wall lavatory. There is a low-tank toilet in a sep-

Joint Exhibit No. 1—(Continued)

arate room. Another room contains an enamel sink and a wooden drainboard.

Area: First story, 1,752; second story, 550; total area, 2,302.

Age: 25 years; remodeled in 1922, 1925, 1929, 1939, 1940, and 1941.

Condition: Fairly good.

PARCEL No. 368

Owner of Improvements: K. Nakamura.

* * * *

Lease: Revocable Permit No. 27—effective February 1, 1924.

Term: 30 days.

Area of Land: 1,400 square feet.

Ground Rental: \$17.50 per month.

Street Address: 732-34 Tuna Street.

Assessed Value of Improvements: \$180.

Valuation of Improvements in Place: \$1,400.

Removal or Salvange Value of Improvements: \$500.

Description of Improvements: This parcel is improved with a one-story frame store building.

Exterior Construction: Lap siding with flat composition roof and cement foundation.

Interior: Contains six rooms and a bath. The front portion is utilized as a cafe, and the rear portion as living quarters. Walls and ceilings are beaded tongue and groove; floors are Oregon pine covered with good linoleum.

Joint Exhibit No. 1—(Continued)

Bathroom has cement floor; large galvanized iron bath tub and a high-tank toilet. There is an enamel sink and a galvanized iron hot water heater in the rear portion.

Area: 1,069 square feet.

Age: 19 years; addition in 1925.

Condition: Good.

PARCEL No. 373-A

Owner of Improvements: T. Koiso.

Lease: Revocable Permit No. 378.

Term: 30 days.

Area of Land: 2,240 square feet.

Ground Rental: \$28.00 per month.

Street Address: 262 Cannery Street.

Assessed Value of Improvements: \$380.

Valuation of Improvements in Place: \$2,100.

Removal or Salvage Value of Improvements:
\$1,000.

Description of Improvements: The improvements consist of a frame bungalow and a frame combination garage and store building.

Frame Bungalow

Exterior Construction: 5-room frame house, with composition roof, and woodsill foundation.

Interior Finish: Plywood walls and ceilings, Oregon pine floors. Kitchen has an enamel sink and wood drainboard; bathroom contains small bath tub, laundry tray, toilet, and lavatory.

Age: Estimated at 20 years.

Joint Exhibit No. 1—(Continued)

Area: 1,021 square feet.

Condition: Fairly good.

Combination Garage and Store Building

Frame construction, corrugated iron clad; unfinished inside.

Area of Garage: 442 square feet.

Condition: Fairly good.

The opinions herein expressed are based on a personal inspection of each of the improvements and of the environing factors, with the exception of the improvements on Parcel No. 373-A. The improvements on that parcel were measured by my employees, but the buildings were removed before I had viewed the interiors, and the information as to the interior finish was therefore obtained from individuals whom I consider to be reliable.

Respectfully submitted,

/s/ RALPH M. HULTS,
M. A. I.

[Endorsed]: Filed Aug. 21, 1947.

[Endorsed]: No. 11956. United States Circuit Court of Appeals for the Ninth Circuit. Southern California Fisherman's Association, W. S. O'Hira, Koto Yamamoto, M. Iwasaki, Roki Seiko, Ben (Benkichichi) Maeda, Sen Tanaka, Mijoji Kawasaki, Naga Nomura, Yosaburo Hama, T. Koiso, T. Nonoshita, Jim Teizo Hatashita and K. Nakamura, Appellants, vs. United States of America, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 15, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11956

SOUTHERN CALIFORNIA JAPANESE FISH-
ERMEN'S ASSOCIATION, et al.,

Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

STATEMENT OF POINTS ON APPEAL

Pursuant to Rule 19(6), Rules of Practice of this court, appellants herewith file their statement of points on which they intend to rely on appeal:

(1) The Trial Court erred in adopting the theory

of evaluation as the value of the property as removed from land.

(2) The property should have been evaluated on the theory of the "whole" and appellants awarded compensation for their property as a part of the land.

Dated this 28th day of July, 1948.

A. L. WIRIN and
FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellants.

[Affidavit of service attached.]

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

DESIGNATION OF RECORD FOR PRINTING

To the Clerk of the Above Entitled Court:

Pursuant to Rule 19(6) of the rules of this Court, appellants hereby designate as the parts of the record they think necessary for the consideration of the appeal and the points upon which they intend to rely the following:

All of the record as certified to this Court by the Clerk of the District Court, saving and except the legal descriptions of the parcels of land set forth in Joint Exhibit "I."

A. L. WIRIN and
FRED OKRAND,

By /s/ FRED OKRAND,
Attorneys for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed July 29, 1948. Paul P. O'Brien, Clerk.

In the District Court of the United States, Southern
District of California, Central Division

No. 2078-H—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND, MORE OR LESS, IN THE
COUNTY OF LOS ANGELES, State of Cali-
fornia, et al.,

Defendants.

ANSWER OF SOUTHERN CALIFORNIA JAP-
ANESE FISHERMEN'S ASSOCIATION, A
CORPORATION DEFENDANT

Comes now the Southern California Japanese Fishermen's Association, a corporation, organized and existing under and by virtue of the laws of the State of California, and for Answer to the Amended Complaint in the above-entitled action, so far as said complaint affects said defendant, alleges:

I.

That it is the owner of Parcel 290 as set forth and described in said Amended Complaint.

That the defendant occupied and used said parcel under a permit with the Board of Harbor Commissioners, effective commencing January 1, 1924, at a monthly rental of \$50.00; that under said permit the defendant had the right to use said property for the erection of certain buildings; and pursuant to said permit said defendant entered possession of said property and improved the same with build-

ings as follows: Two buildings, one a wood one-story [1*] building, approximately 36' x 100' in size, containing a meeting hall and two rooms and a kitchen; the other a frame building approximately 36' x 85', having seven rooms and used as a residence and office.

II.

On the 25th day of February, 1942, the plaintiff herein, by notices in writing, required the said defendant, by virtue of an Order made in this Court, demanded the immediate exclusive possession of said property and required that said defendant and all occupants of said premises vacate, leave and remove from said premises and the whole of such described area, not later than midnight on Friday, February 27, 1942, Pacific war time, and further notified said defendant that said property included all buildings and improvements and that said defendant should not remove any part or portion of any of said improvements.

III.

That at once, upon the service of said notice, the entire property known as Terminal Island was closed and that said defendant was excluded from said island and improvements on the property hereinbefore described, and that said defendant has never, since the service of said notice on the 25th day of February, 1942, been allowed the privilege of removing its improvements.

* Page numbering appearing at foot of page of original certified Transcript of Record.

IV.

This defendant is informed and believes, and on such information and belief charges the face to be that said improvements remain on said premises and that the plaintiff through the Navy Department is in possession of said premises and has been since defendant was excluded therefrom, actively using said improvements for its own use and benefit to the exclusion of said defendant.

V.

That notwithstanding the privilege granted by the said permit issued by the Harbor Commission that said defendant was [2] accorded a right to 30 days after notice of cancellation to remove said buildings, the defendant, by reason of taking possession thereof by said Navy Department, was unable to remove its improvements or any part thereof, because it had no access to said property.

VI.

The defendant spent approximately \$17,500.00 in making the improvements aforesaid.

VII.

Said improvements, when said defendant was excluded therefrom, and when said Navy Department took possession thereof, was and is, of the value of \$7,500.00.

Wherefore, this defendant prays that its damages for the taking of said improvements be determined to be the sum of \$7,500.00, and that a judgment for that amount be entered in favor of the Southern

California Japanese Fishermen's Association, and
for its costs.

A. L. WIRIN and J. B. TIETZ,
By /s/ A. L. WIRIN,

Attorneys for Southern California Japanese Fish-
ermen's Association.

(Duly Verified.)

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed Jan. 16, 1946. [4]

[Title of District Court and Cause.]

MOTION TO STRIKE FROM ANSWER OF
DEFENDANT SOUTHERN CALIFORNIA
JAPANESE FISHERMEN'S ASSOCIA-
TION, a corporation

(Parcel No. 290)

Comes now the United States of America, plain-
tiff herein, by and through Eugene D. Williams,
Special Assistant to the Attorney General, and
Reuben Rosensweig, Special Attorney, Lands Di-
vision, Department of Justice, as its attorneys, and
moves the above entitled Court for an Order strik-
ing from the Answer of defendant Southern Cali-
fornia Japanese Fishermen's Association, a cor-
poration, in the following particulars, to-wit:

1. Commencing at line 24, page 2, and ending on
line 29, page 2, designated in said Answer as para-
graph IV, as follows:

“IV.

“This defendant is informed and believes, and
on such information and belief charges the fact to

be that said improvements remain on said premises and that the plaintiff through the Navy Department is in possession of said premises and has [5] been since defendant was excluded therefrom, actively using said improvements for its own use and benefit to the exclusion of said defendant.”

2. Commencing at line 31, page 2 and ending on line 5, page 3, of said Answer, designated therein as paragraph V, as follows:

“V.

“That notwithstanding the privilege granted by the said permit issued by the Harbor Commission that said defendant was accorded a right to 30 days after notice of cancellation to remove said buildings, the defendant, by reason of taking possession thereof by said Navy Department, was unable to remove its improvements or any part thereof, because it had no access to said property.”

3. Commencing at line 7, page 3 and ending on line 8, page 3, of said Answer, designated therein as paragraph VI, as follows:

“V.

“The defendant spent approximately \$17,500.00 in making the improvements aforesaid.”

Said Motion will be made upon the grounds that the allegations in paragraphs IV and V apparently are based upon the assumption that the improvements upon the above numbered parcel, upon the institution of the above numbered condemnation proceedings, were not acquired therein, and that the United States Navy Department remained in pos-

session thereof without authority, and further, that said allegations are immaterial, incompetent and irrelevant.

Said Motion will be made upon the further grounds that the allegations contained in paragraph VI in said Answer, as above set forth, are immaterial, incompetent, irrelevant and redundant and that the amount [6] of money spent in the construction of improvements is inadmissible.

Said Motion will be based upon the files, records, papers and proceedings in the above entitled matter and upon the Points and Authorities presented herewith.

Dated: March 25, 1946.

EUGENE D. WILLIAMS,
Special Assistant to the Attorney General.
REUBEN ROSENSWEIG,
Special Attorney, Lands Division,
Department of Justice.
By /s/ REUBEN ROSENSWEIG,
Attorneys for Plaintiff.

[Endorsed]: Filed Mar. 25, 1946. [7]

At a stated term, to-wit: The February Term, A.D. 1946, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles, on Monday, the 29th day of April, in the

year of our Lord one thousand nine hundred and forty-six.

Present: The Honorable Jacob Weinberger, District Judge.

[Title of Cause.]

This cause coming on for (1) hearing on motion of the plaintiff, filed March 25, 1946, to strike from the Answer of defendant Southern California Japanese Fishermen's Association; and (2) for setting for trial, (as to Parcel 290); Reuben Rosensweig, Special Attorney, Lands Division, Dep't of Justice, appearing as counsel for the Government; A. L. Wirin, Esq., appearing as counsel for the defendant Southern California Japanese Fishermen's Association:

Respective counsel make statements and it is stipulated that defendant consents to granting of the motion, and it is ordered that the said motion is granted.

Respective counsel state that a stipulation of facts and briefs will be filed to simplify the issues and that thereafter, within approximately two weeks, counsel desire to request a setting.

It is ordered that the cause be, and it hereby is, continued to May 13, 1946, for setting as to Parcel 290. [8]

[Title of District Court and Cause.]

COUNTERDESIGNATION OF CONTENTS OF RECORD ON APPEAL

Comes now the United States of America, the appellee herein, pursuant to Rule 75, Federal Rules

of Civil Procedure, and counterdesignates the following portions of the record to be contained in the record on appeal to the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause:

1. Answer of Southern California Japanese Fishermen's Association filed January 16, 1946.

2. The motion to strike referred to in the affidavit of A. L. Wirin, of date April 13, 1946. Also the ruling on that motion.

3. The ruling of Judge Hollzer on valuation referred to by Judge Weinberger in his order of October 2, 1946.

4. Transcript of the evidence before the court.

5. Exhibit No. 1, omitting the legal descriptions.

/s/ JAMES M. CARTER,
United States Attorney. [10]

[Endorsed]: Filed Aug. 17, 1948. [9]

[Title of District Court and Cause.]

WITHDRAWAL OF ITEM 3 OF COUNTER-
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL

Comes now the United States of America, the appellee herein, and withdraws from its Counter-designation of Contents of Record on Appeal filed in the Office of the above identified Court the 17th day of August, 1948, that portion thereof identified as Item 3, reading as follows:

The ruling of Judge Hollzer on valuation referred to by Judge Weinberger in his Order of October 2, 1946.

/s/ JAMES M. CARTER,

United States Attorney.

[Affidavit of Service by Mail attached.]

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

**NOTICE OF FILING OF WITHDRAWAL OF
ITEM 3 OF COUNTERDESIGNATION OF
CONTENTS OF RECORD ON APPEAL**

To: A. L. Wirin and Fred Okrand, Attorneys for
Southern California Japanese Fishermen's As-
sociation, et al.

Please take notice that the United States of
America, appellee, has this day filed its Notice of
Withdrawal of Item 3 of Counterdesignation of
Contents of Record on Appeal.

Dated: This 15th day of November, 1948.

UNITED STATES OF AMERICA,

Plaintiff,

By JAMES M. CARTER,

United States Attorney.

GEORGE F. HURLEY,

Special Attorney, Lands Division,

Department of Justice.

By /s/ GEORGE F. HURLEY,

Attorneys for Plaintiff-Appellee.

[Endorsed]: Filed Nov. 15, 1948.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO SUPPLEMENTAL RECORD

I, Edmund L. Smith, Clerk of the United States District Court for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 12, inclusive, contain full, true and correct copies of Answer of Southern California Japanese Fishermen's Association; Motion to Strike From Answer of Defendant Southern California Japanese Fishermen's Association; Minute Order Entered April 29, 1946; Counter-Designation of Contents of Record on Appeal; Withdrawal of Item 3 of Counter-Designation of Contents of Record on Appeal and Notice of Filing of Withdrawal of Item 3 of Counter-Designation of Contents of Record on Appeal which, together with copy of reporter's transcript of proceedings on August 12, 1947, transmitted herewith, constitute the supplemental transcript of record on appeal to the United States Court of Appeals for the Ninth Circuit.

Witness my hand and the seal of said District Court this 19th day of November, A.D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk.

United States District Court for the Southern
District of California, Central Division

The Honorable Jacob Weinberger, Judge presiding.

No. 2078-W—Civil

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LAND, etc., et al.,

Defendants.

REPORTER'S TRANSCRIPT OF
PROCEEDINGS

Los Angeles, California

August 12, 1947

Appearances: For the Plaintiff: George F. Hurley and Reuben Rosensweig, Special Attorneys, Lands Division, Department of Justice. For the Defendants: Fred Okrand, Esq., 416 Douglas Building, Los Angeles, California. [1*]

The Clerk: No. 2078-W, Civil, United States vs. Land, et al., for trial.

Mr. Hurley: If the court please, the plaintiff is ready as to the parcels at issue at this moment.

Mr. Okrand: Ready for the defendants, your Honor.

Mr. Hurley: If the court please, a jury has been waived, and the cause has been submitted to the court; and your Honor will recall that a few weeks ago we had a pre-trial hearing at which the issue before the court was the rule of evidence to be fol-

* Page numbering appearing at foot of page of original certified Reporter's Transcript.

lowed in the introduction of testimony on behalf of valuation.

It was contended by the government that the basis of valuation should be the value, the removal value, of the buildings upon the lots whereon they were situated at the time the declaration of taking was filed; and the order of possession was entered on the 21st of February, 1942. It was an immediate order of possession, and the United States went into possession forthwith.

Your Honor will recall that the title situation with respect to the parcels involved in this case was this: the fee was owned by the City of Los Angeles through the Harbor Department of that city.

The Harbor Department had issued 30-day revocable permits. [2]

These permits provided that at the end of 30 days after notice the owner must remove the fixtures.

Before this order of possession, it being summary, there was no opportunity before 30 days elapsed for the owners of the property to remove their buildings under their permits.

Therefore, it became a question to determine, since they did not own the fee, what was the value of their improvements.

The matter had been previously heard by Judge Hollzer, and both Judge Hollzer and you reached the same conclusion: that the proper rule of evidence to be observed in the introduction of evidence on this matter was that the value of the property was for removal and not as a part of the realty to which the defendants' counsel excepted; and acting

upon that instruction, the United States has prepared to present testimony to support the valuation of the parcels involved.

Now, for your Honor's information and for the purpose of the record, the parcels involved in this particular hearing, and which are subject to your Honor's ruling, are Parcels 290, 294, 314, 326, 338, 354, 355, 356, 357, 358, 362, 366, 367, 368 and 373-A.

With regard to Parcel 373-A, we have this to state:

There is no such parcel in the complaint or declaration of taking or any of the amended or supplemental declarations [3] of taking. But there is a tract of land with some improvements on it which can be and will be, in the course of the hearing to-day, identified. It was included, I might say, in the taking, and was occupied by the United States; so there is no question about that.

So, for the purposes of identifying it in this action, we have agreed to call it 373-A.

On that parcel we will identify it, describe what is on it.

Our witness, however, not knowing what that parcel was, could not prepare his notes. But we will stipulate at the appropriate time to whatever figures he will present will be binding upon both parties, and in that matter there will be evidence before the court as to the valuation of Parcel 373-A, for your Honor's judgment pursuant to this hearing.

Now, the United States, therefore, will contend that the valuation of these properties is their re-

moval valuation. And that is the sole issue which the plaintiff will have to present to the court at this time.

The Court: What parcels are being disposed of today?

Mr. Okrand: The ones that Mr. Hurley mentioned are the ones in issue.

Mr. Hurley: There are 15 parcels altogether, and it constitutes approximately half of the outstanding and open parcels in this action. Some of the ones remaining, your [4] Honor, will have to be disposed of by publication as we have had difficulty in locating the defendants.

Mr. Okrand: Counsel for the government has well stated the status of the case, your Honor. And I shall at the appropriate time restate defendants' position as to the valuation by way of objection to the evidence that will be introduced by the government witnesses on the stand.

Mr. Hurley: Is your Honor prepared to hear the testimony on behalf of the plaintiff?

The Court: Yes.

Mr. Hurley: Come forward, Mr. Hults.

RALPH M. HULTS

called as a witness by and on behalf of the plaintiff, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: Ralph M. Hults, H-u-l-t-s.

Direct Examination

By Mr. Hurley:

Q. Mr. Hults, where do you live?

(Testimony of Ralph M. Hults.)

A. In Pasadena.

Q. What is your occupation?

A. Realtor and real estate appraiser.

Q. How long have you pursued that calling in this locality?

A. Since 1916 in the real estate business, and in [5] real estate and appraising since 1925.

Q. In the course of your experience in the real estate business, what kind of property have you dealt in?

A. Oh, almost all types, except large downtown properties, office buildings.

Q. As an appraiser, what types of property have you appraised?

A. Almost all types, except large downtown office buildings.

Q. Are you familiar with the district in the County of Los Angeles which is commonly known as the Harbor District?

A. Yes, sir, I am.

Q. Have you had occasion from time to time to appraise property in that region?

A. Yes, on a good many occasions.

Q. What type of property prevails in the Harbor District? What is the predominant characteristic of the property down there?

A. Well, mostly heavy industrial properties and wharf facilities, and things of that sort.

There are, however, some housing or what was prior to the war some housing facilities, also, for people who worked in the harbor area.

Q. Yes. On or about January and February and

(Testimony of Ralph M. Hults.)

March of 1942 did you have an inquiry directed to you by the United [6] States Government relative to making an appraisal of property in this area?

A. Yes, I did.

Q. Pursuant to that inquiry did you proceed to the region which is commonly known as the Fish Harbor area to make that study?

A. Yes, I did.

Q. Will you explain to the court just what you did in connection with the making of that study?

A. Well, there were also other properties involved in the same appraisal besides the Fish Harbor area. There was about 10 blocks along Seaside Avenue which the government was acquiring in fee, and I made a personal investigation of each of the properties.

I had people in my employ measure all of the improvements on the properties. We photographed all of them. I personally made an inspection of the buildings on the property, made a search of the records to determine the age of the buildings and also made an investigation to learn about the asking price and selling price of properties in the general area.

I think I had a title search made through the Title Insurance and Trust Company involving a number of fee-owned properties to find out when they had been sold and what they had been sold for, and one thing and another. [7]

Q. In the course of your investigation and study with respect to this property did you discover that

(Testimony of Ralph M. Hults.)

certain parcels of this property, certain parcels involved in this proceeding, were properties consisting of improvements constructed upon permits from the City of Los Angeles to the—

A. (Interposing): Yes, I did, quite a large number of them.

Q. Can you recall offhand or from a study of your notes—could you advise the court as to whether parcels 290, 294, 314, 326, 338, 354, 355, 356, 357, 358, 362, 366, 367, 368 and 373-A were such properties?

A. All excepting 373-A, and I find in examining a map that was prepared by me that I have certain improvements located on the property where apparently 373-A was supposed to be and undoubtedly have notes in my file about the type of construction.

I have a sketch of the two buildings that were located on it, but I don't have the notes as to the type of construction, and so forth.

Q. I trust you won't object to this leading question, but insofar as your records show, you are quite certain that all of the parcels which I have enumerated were such properties, except Parcel 373-A?

A. Yes, that is correct.

Q. In the course of your examination and study of the [8] parcels which I have enumerated, did you make any discoveries as to what kind of improvements were situated upon those properties?

A. Yes, I made an inspection of the improvements on each of the properties.

Mr. Hurley: Counsel, in order to save time, will

(Testimony of Ralph M. Hults.)

it be necessary for me to have him describe each of the parcels?

Mr. Okrand: No, I think a general statement that they were—well, I would stipulate that they were improvements of a permanent nature: buildings, residences attached as a part of the land.

Mr. Hurley: Well, I think that is fair enough.

Q. That is true as a fact, is it not?

A. Yes, that is true.

Q. Now, from your analysis of these parcels and from your knowledge of the improvements that were situated upon them as of February 21, 1942, did you reach a conclusion as to what the fair value of those buildings for removal purposes would be as of that date?

Mr. Okrand: Your Honor, I object to the question on the ground that the theory of the question is that the proper valuation in this action is the removal value of those buildings from the land.

It is the defendants' contention that the proper evaluation should be those buildings as a part of the land and that [9] the evaluation should be taken as a whole and not as a removal value.

The Court: It should be taken as what?

Mr. Okrand: The valuation should be those buildings valued as a part of the land as a whole, rather than those buildings as removed from the land.

The Court: Well, assuming that the theory upon which the court heretofore made its order in that respect, rather not an order but an indication that

(Testimony of Ralph M. Hults.)

such would be the ruling that the evaluation should be based on the removal value, the objection is overruled.

Mr. Okrand: Yes, your Honor. May I make just one statement?

Mr. Hurley: You had better except to that because the rule did not provide for that.

Mr. Okrand: May I make one statement before I make the exception, your Honor?

Since your Honor made his indication at our pre-trial hearing several months ago, two cases have been cited or have come to my attention which, if the court would care to look at them, would throw perhaps some light on the subject.

In those two cases it was the government who was contending that the valuation should be taken as of a whole and that the particular interests of the land should not be split up for purposes of evaluation in an eminent domain [10] proceeding.

The Court: Will you speak a little louder, please?

Mr. Okrand: Since your Honor made his indication at the pre-trial hearing several months ago in which you indicated that the property valuation was the buildings as removed from the land, two cases have been cited, not precisely on the particular point, but extremely helpful, I believe, to the court in that in those cases the government contended and was successful in its contention that the proper evaluation was the evaluation as a whole and that the particular interests of the condemnees

(Testimony of Ralph M. Hults.)

are not to be considered by the court in determining the valuation of their particular interests; that that was a matter to be determined between the condemnees themselves amicably, if possible or, if necessary, by a court in determining their interests. But insofar as the condemnation proceeding itself was concerned, the entire thing that was taken by the government is to be valued as a whole. And I would like to—

The Court (Interposing): Well, was that land privately owned? Or was it owned, as in this case, by a municipality on revocable permits?

Mr. Okrand: They were privately-owned properties, your Honor.

The Court: Would that not make a difference?

Mr. Okrand: No, I do not believe so, your Honor. The [11] principals of those cases are what I am contending for, and that is where there are several interests in land that the condemnation evaluation should be one evaluation for the total amount of what was taken by the government.

The Court: But in those other cases the taking was of the land, and improvements, was it not?

Mr. Okrand: Yes.

The Court: In this case the taking is only of the improvements.

Mr. Okrand: No, your Honor, the government took the land and the improvements.

The Court: I know. But you have nothing to do with the land.

Mr. Okrand: That is the precise point.

(Testimony of Ralph M. Hulst.)

The Court: I understand. But I say there was a transaction consummated between the owner of the land, the city—

Mr. Okrand: Yes.

The Court: —and the government, separate and apart from your transaction.

Mr. Okrand: Yes. But of that transaction the government cannot take advantage, it is our contention.

The Court: You have argued that before.

Mr. Okrand: Yes. I would like to cite those cases to your Honor if you want to look at them, perhaps.

The Court: Have they been cited before? [12]

Mr. Okrand: No, they haven't.

The Court: I should like to see them.

Mr. Okrand: These are new cases. That is the reason I would like to bring them up. Shall I do it now?

The Court: You might prepare a memorandum.

Mr. Hurley: What are the cases?

Mr. Okrand: The first case, Eagle Lake Improvement Company vs. United States, 160 Fed. (2d) 182, Circuit Court of Appeals of the Fifth Circuit.

The Court: What was it?

Mr. Okrand: 182. Fifth Circuit. Those are 1947 cases.

The other one is United States vs. 19,573 Acres of Land. That is reported in 70 Fed. Supp. 610. I don't know what district that is.

(Testimony of Ralph M. Hulst.)

Mr. Hurley: It is one of the eastern districts.

Mr. Okrand: Are you familiar with that?

Mr. Hurley: Yes. If the court please—have you completed?

Mr. Okrand: I wanted to give that to the court because we hadn't cited those cases to you before.

The Court: What was done in those cases? What kind of land was it?

Mr. Okrand: The only point that I make, your Honor, is this: that there were several interests involved in the land, and those cases definitely settle, I think, that the [13] evaluation in condemnation proceedings should be the total amount of all that is taken and that if there are conflicting interests in what was taken by the government that that is a matter not the government's concern but the concern of the various persons involved in the taking.

The Court: In this case I think it developed, did it not, that your tenancy had been terminated prior to the government's taking?

Mr. Hurley: That's right.

Mr. Okrand: Well—

The Court: If I remember correctly.

Mr. Okrand: —of course, that brings up an issue that we had both felt would not have arisen, that is, the taking was done this way, you see: in other words, the Navy told the government, "We want this property. Condemn it."

The Navy also told the City, "The government is going to condemn the property; so revoke the permit."

(Testimony of Ralph M. Hulst.)

So the City revoked the permits a couple of days or four or five days before.

We contend that that was no termination of tenancy at all.

The Court: You contend it was all one plan?

Mr. Okrand: Well, not a plan. It was part of the condemnation proceeding.

The Court: I think that was considered before.

Mr. Okrand: Yes, it was.

The Court: And this conclusion was arrived at after a consideration of all that situation?

Mr. Hurley: I feel, if the court please, that the two cases cited by counsel do not change the rule because the two cases cited are not cases wherein the interests were divided by the result of exercise of lawful right by the owner of land to revoke a permit and, consequently, I feel that neither of those cases applies to this particular situation.

The Court: In other words, you feel that in this particular case the owners of the improvements are entitled only to the benefit of those improvements and no benefit as a result of any land valuation in which they had an interest?

Mr. Hurley: That is correct, sir, and the day this condemnation actually was instituted the owners had a legal right to the property which consisted of the right to take those improvements and move them somewhere or dispose of them somehow, and the valuation which should be assigned to them in order to give them just compensation under the Constitution is that particular valuation.

(Testimony of Ralph M. Hults.)

That was the point which was argued by the United States, by my associate, Mr. Rosensweig, at the time the matter was before your Honor previously.

We felt that under the circumstances it would be that [15] valuation, and in pursuance of that we have prepared our witness or, rather, had him prepare himself to testify on that basis.

The Court: Your objection then is overruled.

Mr. Okrand: Very well, your Honor. As I understand it, in the eminent domain proceedings the common law necessity for exception is the rule: so, if the court please, I take an exception to the court's ruling.

The Court: Very well.

Mr. Hurley: In order to obviate the necessity of counsel's exceptions, the government is prepared to stipulate as to any objection that will be stated that there is an exception so that you will not need to constantly arise.

All the objections may be considered as excepted.

Mr. Okrand: Excepted to?

Mr. Hurley: Yes.

The Court: Very well. There need not be repetition of your exceptions to the ruling as to each objection.

Mr. Hurley: That is right.

Mr. Okrand: Yes, your Honor.

Q. (By Mr. Hurley): Mr. Hults, from your studies and from your indicated preparation on this matter, could you give what, in your opinion, is

(Testimony of Ralph M. Hults.)

the fair removal value of the fixtures and improvements which were located on Parcel 290 as at February 21, 1942? [16]

A. Yes, sir, \$1,650.

Q. Now, directing your attention to Parcel 294, will you give the court your opinion of the fair removal value of the fixtures that were located on that parcel on the 21st of February, 1942?

Mr. Okrand: Your Honor, in order to avoid repetition, may it be deemed that counsel for the defendants objects to each question by the government as to the removal value on each particular parcel so that I don't have to object each time he asks that question? The court obviously will overrule the objection, and the exception is taken.

Mr. Hurley: The government is perfectly willing to agree that it will be considered that counsel may make one objection at the conclusion of all this testimony.

The Court: Very well.

Mr. Hurley: Covering all of the parcels, and it will not be deemed that he has waived his rights because he did not object to each one.

The Court: It is stipulated you would object and that you have your exception.

Mr. Hurley: Mr. Reporter, did the witness answer?

The Witness: No, I did not. On Parcel 294, \$350.

Q. (By Mr. Hurley): You can assume, Mr. Witness, that in every case the date of valuation is

(Testimony of Ralph M. Hults.)

February 21, 1942, so we won't have to repeat that date. [17] A. Yes.

Q. Have you formed an opinion as to the fair removal value of the improvements situated on Parcel 314? A. Yes, sir, \$2,250.

Q. With respect to Parcel 326, have you formed a like opinion?

The Court: Have you made a report on these valuations?

The Witness: Yes, sir, I have.

The Court: Can you set out the valuations as to each one of these parcels in the form of a report so that it can be an exhibit in the case?

Mr. Okrand: I would so agree. I think it would be very helpful.

Mr. Hurley: I think it could be done. What your Honor requests is a summary by the witness on his evaluations on these several parcels?

The Court: Yes. In other words, you have evaluated in accordance with the questions propounded by government counsel each parcel that has already been—

The Witness (Interposing): Yes, I have, all those here before me.

The Court: You have all of those, and you can make your synopsis on that exhibit, can you not?

The Witness: Yes, sir, surely. Direct a letter to the court? [18]

The Court: In whichever form you prefer.

The Witness: Or to Mr. Hurley?

Mr. Hurley: We could prepare—

(Testimony of Ralph M. Hults.)

Mr. Okrand: Prepare a stipulation. That is what we hoped to do anyway.

Mr. Hurley: In view of the fact that the witness' testimony is what the court wants—

The Witness (Interposing): I have them right here before me, unless you would rather have it in a different form. There are only about eight or nine more parcels.

Mr. Hurley: There are 15 parcels altogether.

The Court: Well, you may proceed.

Mr. Hurley: We will be perfectly willing to file with the court a synopsis of the witness' testimony as to valuations on each of these parcels.

The Court: Yes. Well, you may proceed. No. 326 was your last.

The Witness: 326, \$200.

Q. (By Mr. Hurley): Parcel 338: What is the fair removal value as of that date?

A. \$300.

Q. And Parcel 354? A. \$600.

Q. The parcel next to it, 355, Mr. Hults?

A. \$400. [19]

Q. And Parcel 356? A. \$600.

Q. Parcel 357? A. \$350.

Q. Parcel 358?

The Court: Parcel 357 was how much?

Mr. Hurley: \$350, your Honor.

The Court: Yes?

The Witness: 358, \$500.

Q. (By Mr. Hurley): And Parcel 362?

A. \$350.

(Testimony of Ralph M. Hults.)

Q. Parcel 366? A. \$300.

Q. Parcel 367? A. \$700.

Q. Parcel 368? A. \$500.

Mr. Hurley: Now, if the court please, with regard to Parcel 373-A, which is the only parcel which the witness has not testified to yet, he advises us that because he could not locate that parcel, due to the fact that the identifying letter was not disclosed in any of the maps or plats, that he will have to refer to his penciled memoranda which he has in his files and will supply that amount at a later date. And we will submit that to counsel for the defendants, and [20] if it is satisfactory we will add that to the exhibit which will be prepared for your Honor as the evaluation for Parcel 373-A.

So at the present time the government moves that the testimony as to Parcel 373-A be left open until those figures can be supplied.

The Court: You stipulate that he may file a statement or letter with respect to that?

Mr. Okrand: We will so stipulate.

Mr. Hurley: Yes, we will stipulate to that; yes, sir.

The Court: In view of his verbal testimony?

Mr. Okrand: Yes.

Mr. Hurley: Yes, sir. Would you like to cross examine?

Mr. Okrand: Yes.

Cross Examination

By Mr. Okrand:

Q. Mr. Hults, when you made your appraisal in

(Testimony of Ralph M. Hults.)

1942, all the buildings were still standing at that time, were they not?

A. No. I was just refreshing my memory, and I think there were five sets of improvements that I never saw; and all the information I ever had was from other people who had reviewed the property prior to the time that I had.

None of those happened to be any of the parcels at issue in this case, however. I am just refreshing my memory [21] from my notes, and I saw the buildings on all of the parcels appraised, except Parcels 303, 311, 312, 313, 322, 323 and 345; and none of those parcels are at issue at this time.

Q. Now, from your examination of the parcels at issue at this time and of the entire section, would you say that it exhibited signs of having been a thriving business and commercial community?

A. Oh, yes, there is no doubt about it.

Q. In your appraisal, Mr. Hults, did you also make an appraisal as to the value of the parcels now involved on the theory of their value as a part of the land?

A. Yes, sir, I did.

Q. As to Parcel 290, do you have the evaluation of that parcel as a part of the land?

A. Yes, sir.

Q. What is that evaluation?

Mr. Hurley: If the court please, the government objects to that question upon the ground and upon the theory on which the testimony is being presented in this case. The evaluation of the property as a whole is not pertinent for the ascertain-

(Testimony of Ralph M. Hulst.)

ment of value because the rights of the property owner are to recover only the values which the property would have to him as removed.

The Court: How is counsel going to establish his record if he intends to take the matter up on appeal unless that is [22] gone into?

Mr. Okrand: That is what we are trying to do, your Honor.

The Court: Unless that appears in the record?

I have ruled against the defendants' theory, but in the event that the case is taken up on appeal and it should be reversed, then could not the record be there so we could avoid having to send the proceedings back for another trial?

Mr. Hurley: If the court please, I should imagine that probably the most proper procedure here under the circumstances would be if your Honor were so disposed to overrule or to sustain my objection, at the close of the testimony that counsel for the defendants—

The Court: Would make his offer?

Mr. Hurley: —would be entirely within his rights to make his offer of proof; and to that extent we would be willing to submit whatever figures he wished to the court as to what he would prove if the avenue of evidence were open to them.

In order that the matter will not be interminable, we would be willing to waive the formalities of the proof so that he could get right to the substance of it.

In other words, when I would say, "If I asked

(Testimony of Ralph M. Hults.)

this question," the answer would be so-and-so; but you can just give the ultimate facts which the witnesses would offer under [23] the circumstances.

The Court: That is to say, he would offer to prove by this witness—

Mr. Hurley: Yes, sir.

The Court: —that if the objection were overruled, the witness would testify thus-and-so, is that it?

Mr. Hurley: Yes, sir.

Mr. Okrand: Either way is agreeable with us, your Honor.

The Court: That is probably the proper way of getting that in the record.

Mr. Okrand: Very well. Then what is the court's ruling?

The Court: There is now an objection to the question?

Mr. Hurley: Yes, I have objected.

Mr. Okrand: Yes, sir.

Mr. Hurley: The question proposes an improper basis of evaluation; therefore, it is incompetent, irrelevant and immaterial. It does not tend to support the issues presented in this case.

The Court: If you withdraw your question, you might proceed with your offer and then make the objection to the entire offer.

Mr. Hurley: Well, I think if my objection should be sustained by your Honor— [24]

Mr. Okrand (Interposing): Then I can make my offer.

(Testimony of Ralph M. Hults.)

Mr. Hurley: —then counsel can make his offer.

Your Honor, I can see what is the difficulty. In condemnaton proceedings the Supreme Court, in preparing the rules for civil actions, did not include condemnation proceedings; but by its terms expressly excluded them, except on matters of appeal.

Consequently, we are back where we were in the old common law days and not under the provisions of the practice act as it stands now.

For that reason, we are back just as it was when your Honor was on the Superior bench in the State.

The Court: Well, then, the objection is sustained.

Mr. Okrand: Very well, your Honor. At this time I should like to make an offer of proof through the witness now on the stand.

Mr. Hurley: That if he were examined he would testify—

Mr. Okrand: I will make it in this way: that if the witness were examined, he would testify that the value of the parcels involved in these proceedings as a part of the land was, as of February 21, 1942, as follows:

Parcel 290, \$4,800; Parcel 294—and if I may ask for the witness' assistance, if I am wrong in what he would testify—

The Witness (Interposing): Yes, \$4,800 was correct on [25] the other one.

Mr. Okrand: Parcel 294, \$1,050.

The Witness: That is correct.

Mr. Okrand: Parcel—

(Testimony of Ralph M. Hulst.)

The Court (Interposing): Now, do you want the witness to testify?

Mr. Hurley: The witness doesn't need to answer.

Mr. Okrand: I just want him to follow me, and if I am wrong he can so state.

The Court: If he is wrong, you can correct him. But let us not have your testimony in the record.

Mr. Okrand: Parcel 314, \$8,750;

Parcel 326, \$1,000;

Parcel 338, \$1,350;

Parcel 345, \$3,000;

Parcel 355, \$1,100;

Parcel 356, \$3,500;

Parcel 357, \$2,700;

Parcel 358, \$2,900;

Parcel 362, \$1,950;

Parcel 366, \$850;

Parcel 367, \$3,250;

Parcel 368, \$1,400; and

Parcel 373-A—

Mr. Hurley (Interposing): If the court please, on Parcel [26] 373-A, since we have not yet offered any evidence, I think counsel should make the reservation.

Mr. Okrand: Yes. With reference to Parcel 373-A, since theoretically the witness knows nothing about that at the moment, we would make the same reservation and ask that the witness, when he submits the statement, that he include on that his valuation of 373-A on his theory.

(Testimony of Ralph M. Hulst.)

The Court: You are offering to establish by this witness that the value of the improvements and the real estate—is that your offer?

Mr. Okrand: Oh, no, just the improvements. That is all we are considering here.

The Court: The improvements?

Mr. Okrand: Other than the land itself that was taken. That is all that belongs to the defendants here. And that is what our evaluation figures were in our offer of proof.

The Court: Well, give me more detail on your theory there.

Mr. Okrand: Yes, I will be glad to. The theory is this, your Honor: that a certain improvement on land has a certain value when, considered as a part of the land to which it is attached; and as the offer we have made shows, it is considerably more than the valuation of that particular improvement as it is removed from the land, taken separate and apart. In other words, when a building is a part of the land, [27] it is more or less a going concern; that is, its value is enhanced by reason of the fact that it is a part of the land itself.

The Court: What elements are considered in that respect?

Mr. Okrand: Well, I can get the evidence from the witness himself.

The Court: I want your theory of it.

Mr. Okrand: Well, I believe that since there is an expense involved in removing a building from the land, that that would decrease the valuation of

(Testimony of Ralph M. Hulst.)

that particular building because it is not a part of a going concern already.

The Court: Well, I know. But does it make a difference whether the improvements are on leased property or on fee property or what?

Mr. Okrand: No, I don't believe so.

The Court: For example, suppose that you have improvements on a piece of property upon which the lease has six months yet to go or six years yet to go or that the owner of the improvements is also the owner of the fee. Now, isn't there a difference?

Mr. Okrand: Not as to the valuation of the buildings themselves. In other words, as I understand it, a building has a certain evaluation when considered in relation to its environment, where it is situated, which it would not have if it were situated at another place or if just the value of [28] the lumber itself in the building were considered. And that is the reason for the difference in the evaluation here.

Perhaps the witness can be of assistance to us, your Honor, since he is familiar with that.

The Court: All right. I want to pass on this objection.

Mr. Okrand: Oh!

The Court: Maybe I should at this time. You have made this offer.

Mr. Okrand: Yes.

The Court: Now, the offer is denied. You may proceed.

Mr. Okrand: That concludes our examination of this witness.

(Testimony of Ralph M. Hulst.)

Mr. Hurley: If the court please, the plaintiff rests.

The Court: Let us see. Should we have in the record the basis of the appraisalment?

Mr. Okrand: It might be well. Then it would show why there is a difference of evaluation on the same pieces of wood on one theory as against another.

The Court: Why wouldn't it be a good idea for this witness to make his report showing what he examined, what he took into consideration, in making this appraisalment, so we will have a basis of value?

Otherwise all we have is a naked figure here. We don't know what the improvement is. [29]

The Witness: I have a description of the improvement here on each of the parcels, your Honor, and also have the theory under which I made the appraisal in each instance.

Mr. Hurley: As I understand the law, the responsibility of the plaintiff in a matter of this sort is to present a witness who has examined the property. But we are rather limited in our scope of examination because certain kinds of questions are proper on cross examination which are not proper on direct.

In order to avoid the rather technical procedures necessary to keep it within the scope of direct examination, I asked at the outset whether it would be necessary for me to go into detail as to each of

(Testimony of Ralph M. Hults.)

thees parcels, and counsel for the defendants had indicated it was not.

Now, if it is now a situation where that ought to be done, each parcel should be separately described and what was located on it and what the witness did with respect to each parcel, that of course could be done.

But, as I say, I did not do it, believing that we could save some time and that the defendants didn't consider it necessary; that counsel would not cross examine on it.

The Court: I am afraid that the evidence standing alone would be rather meager.

Mr. Okrand: It wouldn't be very helpful.

Mr. Hurley: Very well. Then I shall retrace my steps [30] and do that which I thought we could avoid and thus make the record reflect the minute details with respect to these parcels.

The Court: Let us see. You have made a synopsis of the examination, have you?

The Witness: Yes, I have, your Honor.

The Court: Do you have that?

The Witness: Yes, I do.

The Court: Why don't you exhibit that to counsel and see if that can be copied and stipulated to and added as an exhibit?

(Brief pause in the proceedings.)

Redirect Examination

By Mr. Hurley:

Q. Mr. Hults. in connection with Parcel 290,

(Testimony of Ralph M. Hults.)

what did you take into consideration in arriving at your evaluation of that parcel?

A. Under which theory?

Q. Under the theory of the removal value.

A. The price that somebody would be willing to pay for the building, for the purpose of removing it from the premises, and also under the theory that there was no place on Terminal Island at that time to which it could be removed and it would have to be removed from Terminal Island.

The Court: It would have to be wrecked? Or could it [31] have been moved?

The Witness: Some of the buildings, I took into consideration the width of the roadways and the width of the bridge leading from the island, and on the buildings which were too large to move without cutting in two, I gave a much less proportionate value than I did on smaller buildings which could have been moved without being cut in two.

I even explored the feasibility of getting some of the larger structures off the island by barge and found that the cost would be prohibitive by that method and decided that the only feasible way of moving them would be by regular moving trucks and rollers and things of that sort.

The Court: How did you arrive at your estimate of what a person would be willing to pay for that building, then?

The Witness: Well, I talked to some building wreckers who buy buildings, and I also had quite a little knowledge because I have run into

(Testimony of Ralph M. Hults.)

these problems a great many times in my appraisal experience, a good many times.

For instance, in appraising school sites, it is necessary to sell houses and remove them; and I have tried to keep familiar with that sort of thing for over a period of years wherever I am appraising properties that have to be removed. I try to keep a record of what is being paid for them.

A little later on in the war I had a record of about 200 buildings that were removed from the naval ammunition [32] depot at Seal Beach. I kept an accurate record of the bids that were made on the houses to the Navy Department.

However, that was after this particular instance, and I hadn't had the experience on so many buildings at one time before.

But I do have a general knowledge of what buildings will sell for to be removed.

The Court: Well, then, to be moved by being dismantled in some instances and by—

The Witness (Interposing): Moving intact in others.

The Court: —moving intact in others?

The Witness: Moving intact in others, yes, sir.

Q. By Mr. Hurley: Do I understand that in each instance you first determined what is the most feasible method of disposal?

A. Well, yes, I looked at the sketches of the buildings to see whether they could be moved in one piece, whether they could be moved across the bridge.

(Testimony of Ralph M. Hults.)

There is only one bridge access—there was at that time—to Terminal Island.

The Court: I take it that the defendants do not question the appraiser's determination of the removal value?

Mr. Okrand: That is right, your Honor. No.

The Court: You do not question that?

Mr. Okrand: No, we do not question the actual figure.[33] What we question is the theory.

The Court: I understand that.

Mr. Okrand: We do not question the figures.

The Court: You don't question the correctness of the appraiser's estimate of the removal value?

Mr. Okrand: No, we do not.

The Court: I guess that determines that particular feature insofar as the testimony of this witness is concerned.

Mr. Hurley: Yes. And the government has rested its case.

Mr. Okrand: I would like to cross examine him a little bit.

The Court: Yes.

Recross Examination

By Mr. Okrand:

Q. Mr. Hults, in your experience as an appraiser you have found, have you not, that the value of a building, while it is situated on a particular parcel of land, will be different, will it not, from the value of that same building if it were removed from that parcel of land?

(Testimony of Ralph M. Hults.)

Mr. Hurley: I object to that question. It is not proper cross examination, under the theory of the evidence which was presented here.

That goes to the same question which was raised by me [34] when I objected to the first question that was asked on cross examination concerning which the offer of proof was made.

It does not tend to come within the framework of this ruling of your Honor's. Therefore, it is incompetent, irrelevant and immaterial.

The Court: Would not your offer of proof determine all those matters insofar as your theory is concerned?

Mr. Okrand: Well, yes, except that I thought that perhaps we ought to go back, as did the plaintiff, and show the basis for the arriving at the figures which we gave in our offer of proof.

In other words, the plaintiff on direct examination gave bare figures on the theory of removal and then retraced his steps at your Honor's suggestion to show the basis of that theory. And we thought perhaps we ought to do that on our theory, too, to show the basis of arriving at the figure on the theory of the evaluation of the improvements.

The Court: I do not see why that should not go into the record, even though the offer has been denied.

He has stated now the method of the appraisalment for the purpose of determining the removal value.

Mr. Hurley: Yes, sir, that is correct.

The Court: Now, counsel wants to elicit from

(Testimony of Ralph M. Hults.)

him a method of appraisement of the value on the theory propounded by counsel for the defendants.

Mr. Hurley: Well, that still falls within the purview of your Honor's ruling because if the witness answers the question, then he must of necessity answer it upon the theory that there is a value being given to the property as a part of the real estate, which is not the issue before your Honor upon the framework of the rule.

I would only tend to confuse the issue rather than enlighten it, as I see it.

The Court. If you know the theory as well as the value, why do you not include that in your offer?

Mr. Okrand: May I have just a moment, and I will do so.

The Court: Yes.

(Brief pause in the proceedings.)

Mr. Okrand: I think I am prepared to make this offer.

We would offer to prove, as a basis for the arriving at the figures which I have offered to your Honor on the value of the property as a part of the whole, that when a building does not have to be removed from the premises and can be used on the premises as they stand, it brings a higher market value to prospective purchasers because they, the purchasers, no longer have to hook up utilities and have transportation costs of bringing a building into an area or the cost of building a new building and that on the open market the witness would testify buildings which can be used in place bring the valu-

(Testimony of Ralph M. Hulst.)

ation which I have suggested to your [36] Honor, and that is the theory on which the higher valuation would be given.

The Court: That is to state in connection with the real estate or otherwise?

Mr. Okrand: In connection with being used on the real estate, yes, those buildings being used on that real estate.

Mr. Hurley: To which the plaintiff objects upon the ground that it supposes a set of facts which are not existent in this case. Therefore, it is irrelevant, immaterial, does not support the issues because the buildings could not stay upon this property because the right of the owner of the building to continue it there had been terminated by lawful operation of the owner of the ground under the terms and conditions of the revocable permit.

Therefore, the offer of proof presupposes a factual setup which is non-existent upon which your Honor has already ruled as outside the range of the proper basis of valuation.

The Court: I am not so sure that I am correct in that ruling. I am wondering if it would not be better to have both of these theories in the record? I have already ruled as to the theory which I will adopt.

Mr. Okrand: I think that would be well, your Honor. We had hoped to do that but had been unable to get official okay on it.

My feeling is that it would be better to have both [37] theories and valuation in the record.

(Testimony of Ralph M. Hults.)

Mr. Hurley: Well, if the court please, we understood and relied upon and prepared this matter upon the basis that the valuation which would be presented to the court would be the removal of these buildings.

The Court: Well, I sustain your theory.

Mr. Hurley: Yes.

The Court: I sustained that. Yet counsel for the defendants maintains another theory which I have not sustained; nevertheless he desires it in the record.

Mr. Hurley: Well, I think he is protected by his offer of proof here to have his rights determined. And I do not believe that if the two theories were in the record under the rules of the Circuit Court that the Circuit Court of Appeals, if it decided that your Honor should be reversed, it could not thereupon enter judgment but would have to remand it anyway.

Consequently, for the purpose of keeping the issues clear and the situation proper, the evidence should be before the court only upon the theory which your Honor has decided should be the theory for the introduction of evidence in this case.

If this were a simple money matter, liquidated as to nature, then under those circumstances the Circuit Court of Appeals could, of course, enter its judgment right there, and [38] the matter would not have to be remanded. But that is not the case here. This is not a liquidated matter.

The Court: I think that is probably correct.

(Testimony of Ralph M. Hults.)

There is no contention by the defendant that the method used by the witness in—

Mr. Hurley: Yes, sir, that's right.

The Court: —in arriving at the removal value is not correct. You have already admitted or agreed to that.

Mr. Okrand: We admit that the witness is competent and has used proper means of arriving at the figure for the removal value.

The Court: And you have no other theory based on that same—

Mr. Okrand (Interposing): We wouldn't arrive at the removal value on any different basis.

The Court: Or different method of valuation?

Mr. Okrand: No. The figure would be the same. Well, your Honor knows our position.

The Court: I think your offer will give you the record that you wish.

Mr. Okrand: We will have our figure in and our basis, and they will have their figure and their basis.

Mr. Hurley: Exactly. I think that is true, your Honor. We can keep to the rule of simplicity under the theory of the defendants. That is the reason I make the objection to the [39] offer.

The Court: The objection is sustained. Anything further?

Mr. Okrand: Nothing from this witness, no, your Honor.

Mr. Hurley: Does your Honor want to hear us at this time after having heard so much from us? Or would you prefer to have us file a memorandum

(Testimony of Ralph M. Hulst.)

and synopsis of the witness' testimony and then later hear us on the judgment?

Mr. Okrand: Excuse me one moment. I did not mean to indicate that we had nothing further to offer. We have nothing more from this witness.

Mr. Hurley: Pardon me. I misunderstood you. I am sorry.

The Witness: May I be excused, your Honor, then? Were they through with me?

The Court: Just a moment.

The Witness: Oh, yes, I am sorry.

The Court: I still think you ought to have in the record the synopsis of these improvements.

Mr. Hurley: Yes. We are prepared to present that.

The Court: And it will be done by a report which—

Mr. Hurley: The witness will file?

The Court: —the witness will file, and counsel will stipulate that he may file such report, is that right?

Mr. Okrand: Yes. [40]

The Court: Showing the type of improvements upon which these valuations have been made by the witness.

Mr. Hurley: Yes, your Honor.

The Court: For the government.

Mr. Hurley: Yes, your Honor.

Mr. Okrand: So stipulated.

Mr. Hurley: And it will include 373-A; and by the same token, the government would stipulate to

(Testimony of Ralph M. Hults.)

your enlarging your offer of proof to cover Parcel 373-A.

Mr. Okrand: Yes.

The Court: I did not quite get that last.

Mr. Hurley: And in connection with that, the government is prepared to stipulate that the defendants may enlarge the offer of proof to include figures for 373-A, which is still open.

The Court: Yes.

Mr. Okrand: I wonder, may we not do that now? Could you not get your figure and we give our figure? It is not going to change. An evaluation has been made, apparently.

Mr. Hurley: The witness advised us, as you will recall, that he has his penciled notes at his office, and it is not possible for him to get it here now. Is that not correct, Mr. Hults?

The Witness: Yes. But this gentleman has the figure. Did that come from some other parcel number? [41]

Mr. Okrand: From Mr. Hurley's office, those two figures. I don't know where he got them.

The Witness: I can't find anything in my notes under that parcel number.

Mr. Okrand: I suppose we had better wait, then.

Mr. Hurley: It is possible, Mr. Hults, that this would just be conjecture and not proper evidence.

The Court: Then the witness may be excused?

Mr. Okrand: The government rests, I take it?

Mr. Hurley: Yes, we have rested.

Mr. Okrand: Dr. Ohira,, will you take the stand, please?

The Court: I think the previous witness may remain in the court room in the event something happens that he might be required again.

W. S. OHIRA

called as a witness by and behalf of the defendants, being first duly sworn, was examined and testified as follows:

The Clerk: What is your name, please?

The Witness: W. S. Ohira, O-h-i-r-a.

Direct Examination

By Mr. Okrand:

Q. What is your address, Dr. Ohira?

A. 312 East First Street, Los Angeles.

Q. And your occupation? [42].

A. Dentistry.

Q. On or about February 21, 1942, Doctor, did you occupy certain premises located on Terminal Island?

A. Yes, sir, 502 Seaside, North Seaside.

Mr. Okrand: Counsel—

Mr. Hurley (Interposing): I am going to move over here so I can hear.

Mr. Okrand: That is okay. Will counsel stipulate that this is Parcel 294, Dr. Ohira's parcel?

Mr. Hurley: Yes, that is correct, 294.

By Mr. Okrand:

Q. How long had you occupied those premises, Doctor?

(Testimony of Dr. W. S. Ohira.)

A. Since 1925, I think, if I am not mistaken. It is quite a long time.

Q. When you first occupied those premises in 1925, what buildings were on the land?

A. Nothing, no building on the ground.

Q. On or about February 21, 1942, what buildings were on the land?

A. The buildings specified for dentistry was built up.

The Court: In 1942?

Mr. Okrand: 1942, yes. That is the date of the removal.

Q. Who built those buildings, Dr. Ohira? [43]

A. Do you mean who put the money up on it?

Q. That is right. Who paid for the buildings?

A. I paid myself.

Q. How much did those buildings cost?

Mr. Hurley: If the court please, I object to that. That is not conducive to the arrival of the removal value of the buildings. There is no criterion or common basis for determining what that will be worth.

Some buildings might cost a hundred thousand dollars to build and would be useless to remove, where some buildings might be worth a thousand dollars to build and might be worth removing.

The Court: The buildings were built in 1925.

Mr. Okrand. No, not in '25. I haven't established the date they were built.

The Court: What was the date?

(Testimony of Dr. W. S. Ohira.)

Mr. Okrand: All right, I will go into that.

Q. When was the building built?

A. I haven't the exact date. I don't remember at the present, but I have the title at home, the plans, and so forth.

Q. To your best recollection, was it in 1940 or 1935? Just about, can you remember?

A. Around '26, '27, somewhere around there. But I haven't exactly to remember. [44]

Q. After the buildings were built in 1926, did you make improvements to the buildings after that?

A. Oh, yes, suite for dentistry, as that building is specify, and putting double siding.

The Court: I cannot understand you.

Mr. Okrand: Just a minute.

Q. After the building was originally built in 1926— A. Yes.

Q. —did you thereafter make improvements to the buildings?

A. Improvement, put on another siding, another room.

Q. When the building was built in 1926 how much was the cost?

Mr. Hurley: If the court please, I object to that question as improper. The value of the building or its costs at that time is no criterion in determining what its removal value was on February 21, 1942.

The Court: What is the purpose of your question?

Mr. Okrand: I would like to have shown the—

(Testimony of Dr. W. S. Ohira.)

The Court: (Interposing): What difference is it what the cost was? You have made an offer of proof that on this date the appraiser, if allowed to testify, would testify it was worth so much.

Mr. Okrand: That's right, your Honor. I withdraw the question. [45]

Q. When you received the order to leave in February of 1942, were you able to take any of the property with you?

The Court: What was that?

Mr. Okrand: Was he able to take any of the property with him when he was ordered to leave.

Mr. Hurley: If the court please, the basic characteristic of the question is not only objectionable, but the phraseology of it is. To take any of the property with him is definitive of nothing which would enlighten the court of what was there to be removed and which could be evaluated as at February 21, 1942.

Mr. Okrand: I can break it down. I will break it down, your honor.

Q. Were you able to remove the building in February when you were ordered to leave the property?

A. Yes, sir. We asked the official, and they said they could take down.

The Court: What?

The Witness: They said we could remove it.

The Court: Yes?

Mr. Okrand: Q. All right. Now, did you remove it?

(Testimony of Dr. W. S. Ohira.)

A. And we tried to contract, to get the contractors, and asked them to remove. Then the orders change. We couldn't move anything at all. So we just left there. [46]

Mr. Okrand: I will try. Without being too leading, I will try to clarify it.

Mr. Hurley: Yes, the answer is objectionable. If you want to back up and start over again, all right.

Mr. Okrand: Q. Were you permitted to move the building when you finally left in 1942?

A. I asked the Harbor Department officials, and they said we could.

Q. Could or could not? A. Could.

Q. All right. Then why did you not remove the building when you left?

A. Because the Navy Department—

Mr. Hurley (Interposing): If the court please, that is immaterial because the buildings were on the premises at the time they were moved, and whether they could or could not does not enlarge or diminish the removal value.

It is conceded by the government that the buildings were on the site on February 21, 1942, and that they had a value as they stood upon the premises at that time. Consequently, motive for removal or non-removal adds nothing to the determination of value, and I think it is clearly incompetent.

The Court: I think that is correct. You have already stipulated that the removal valuations, as given by the appraiser, were correct. [47]

(Testimony of Dr. W. S. Ohira.)

Mr. Okrand: That is, of the building.

The Court: The building.

Mr. Okrand: Perhaps I am not making myself clear.

Q. Was there anything else in the building on February 21, 1942, besides the building itself?

Mr. Hurley: If the court please, I think that is immaterial because the only thing which can be evaluated and the only thing which should be evaluated is the property was the property which was affixed to the realty at the time and had to be removed for the purposes of complying with the requirements of the permit. Any personal property is not being condemned or taken, nor is there any evidence before the court that any personal property was condemned and taken or peremptorily sequestered by the United States.

There is not a shred of evidence—

Mr. Okrand (Interposing): That is what we are trying to show, your Honor.

The Court: There is not any issue here as to that.

Mr. Hurley: No.

The Court: You have not set up any personal property having been taken for which you should be compensated.

Mr. Okrand: Well, the government has taken the property that was located on the land and if there was personal property which was also located on the land which the government took and which

(Testimony of Dr. W. S. Ohira.)

the defendant was unable to remove, he should [48] be compensated for that.

The Court: Is that in your pleadings?

Mr. Okrand: No.

Q. Did you set up any claim for personal property?

Mr. Okrand: We have not set up a claim. We denied the allegations of the complaint.

The Court: There is no issue except the improvements.

Mr. Okrand: That is correct.

The Court: And the witness is going to set out in his statement just what those improvements consisted of, and I refer to the witness Hults.

Mr. Okrand: He has done that already.

The Court: What is that?

Mr. Okrand: He has done that already.

The Court: Well, then, you have that in the record.

Now, if there was a shotgun or something else, dental tools, those are not in issue.

Mr. Okrand: Very well.

The Court: You do not set up anything of that kind.

Mr. Okrand: Not with this witness, no we haven't, your Honor.

The Court: I mean in any way.

Mr. Okrand: No.

The Court: Is there any place in the pleadings where you set up a claim for personal property, not a part of the [49] building?

(Testimony of Dr. W. S. Ohira.)

Mr. Okrand: No, there is not, your Honor.

The Court: I do not see that it has any value in this case. I have heard the testimony. I do not think this line of testimony would be proper as to this case.

Mr. Okrand: Are you acquainted, Dr. Ohira, with Yosaburo Hama? Mr. Hama?

The Witness: Yes, I know him quite well.

The Court: Can you turn your face this way a little bit so that I can probably catch what you say a little better?

The Witness: All right, your Honor.

The Court: When I see you speak, I can hear you better.

Mr. Okrand: Will counsel stipulate that Mr. Hama is the owner of Parcel 358?

Mr. Hurley: I think so. Just a minute. I will check my record.

Yes, we will so stipulate.

Mr. Okrand: Q. Mr. Hama occupied his premises?

Mr. Hurley: If the court please, I object to that question as incompetent, irrelevant and immaterial. How long any of these parties lived on their property has nothing to do with the removal value of the property which was condemned and taken by this proceeding.

The Court: Are you not pursuing the same line of inquiry [50] to which you have already referred in the previous questions? You have made an offer

(Testimony of Dr. W. S. Ohira.)

of proof that the value of the property at that land is so much.

Now, what difference does it make when or how or who lived on the land?

Mr. Okrand: Well, strictly and technically perhaps it would not. But it would mean that the court could be appraised or know what was taken by the government; in other words, not just pieces of lumber but also actually the livelihood and the homes of persons who had been living and working for many, many years.

The Court: Well, that is not at issue here.

Mr. Okrand: Very well. If the court please, I should like to make this offer of proof, if I may.

The court has sustained the objection, but we would make this offer: that we would prove by this witness, if he were permitted to testify, that the defendant, Iwasaki, occupied his parcel for 12 years;

That the defendant Seiko occupied his property for 17 years;

That the defendant Maeda occupied his property for 14 years;

That the defendant Kawasaki occupied his premises for five years;

That the defendant Nomura occupied his premises for four [51] years;

That the defendant Hama occupied his premises for 19 years;

That the defendant Nonoshita occupied his premises for seven years;

(Testimony of Dr. W. S. Ohira.)

That the defendant Hatashita occupied his premises for five years;

That the defendant Nakamura occupied his premises for 18 years;

That the defendant Yamamoto occupied his premises for three years;

That the defendant Tanaka occupied his premises for five years;

That the defendant Koiso occupied his premises for six years.

And the witness has already testified that he had occupied the premises for approximately 16 years.

Mr. Hurley: If the court please, the government will waive as to the form of the proof, of the offer of proof, but we will object—

The Court (Interposing): What is that?

Mr. Hurley: The government will waive the form of the offer of proof but will object to the substance of the offer of proof on the ground that the facts set forth in the offer do not tend to shed and light upon the question of fair removal [52] value of this property, nor does the evidence fall within the issues framed by the pleadings in this case.

The Court: I think that objection is well taken. However, you should have in your offer, in addition to the names, the numbers of the parcels.

Mr. Okrand: I am going to do that. I had that in mind.

Mr. Hurley: I am perfectly willing to stipulate that you may supplement the offer by giving the appropriate parcel numbers to the property.

(Testimony of Dr. W. S. Ohira.)

Mr. Okrand: Yse. As a matter of fact, I believe the record should also contain, as a part of the record itself, the parcel number and the person who owned the parcel.

Even as a part of the government's case, I think that probably should have been in; and if there is no objection, I shall state what parcel was owned by what defendant so that the record will show the parcel number and the defendant's name. Also, your Honor already has the evaluation, even on the government's theory.

The Court: Why do you not gather all this together and put it in the record in some written form? Then you will have everything in there that you want: Parcel number blank, owned by so-and-so, occupied so many years, and whatever else you want to make your offer include.

Mr. Okrand: Very well. But does not your Honor feel [53] that even aside from our offer that the parcel number should be identified with the name?

The Court: I think it should be. I do not know how it is relevant, but as long as you are making the offer, you ought to make a complete offer.

Mr. Okrand: What I mean is, aside from the offer of proof but even as a part of the proof that is before this court already, all we have is the parcel number and the evaluation on the removal theory.

It seems to me that those parcel numbers should be identified with the names of the defendants.

The Court: I think so. If you pay the money

(Testimony of Dr. W. S. Ohira.)

over, if you do pay the money, you want to know to whom you are paying it.

Mr. Hurley: If the court please, in explanation of the reason that the government did not give the names of the owners of the parcels when the record of parcels at issue was read to your Honor at the outset by me as representing the government, it is this: The declaration of taking has been filed, and in and by that declaration of taking the parcels are described; the amount of the estimated compensation is indicated.

The defendants are all named by the amended complaint. What we are condemning is the right to remove this property, or the compensation for the withdrawal, the right of the [54] owner to remove the property. The fact of who owns it is of no importance in arriving at what that damage is worth to the owner, and since we have the parties properly named in the proceedings, it was not incumbent upon the plaintiff to indicate those names in the record at the time.

However, we have no objection to doing it.

The Court: It is not incumbent upon the court in a condemnation proceeding to make a determination including the persons to whom the award shall go.

Mr. Hurley: At the time the matter is before the court on a hearing as to the evaluation of the property condemned, all the parties who have interest are before the court. The only question is the amount of the value of the taking.

(Testimony of Dr. W. S. Ohira.)

The Court: To whom are you going to pay the money?

Mr. Hurley: Then if there is any dispute under the declaration of taking act, at the time the question of who the parties are and their interests, that becomes paramount; and it is indispensable then to the issue to determine who the parties are.

Actually the defendants are named by the pleadings, and your Honor has before him the pleadings and, therefore, has judicial knowledge of the names of those defendants.

For that reason I did not think it was necessary to enumerate them.

Mr. Okrand: Would it not be better to do it, and then [55] we will be clear on it?

Mr. Hurley: I am perfectly willing to do it but I did not want to make it appear that it was something which ought to have been done because the law does not legally require it. But I am very happy to join you in doing it, I assure you of that, Mr. Okrand.

Mr. Okrand: Well, let us do it, then.

The Court: I think the court is required to determine the parties respectively entitled to the award.

Mr. Hurley: Yes, sir, that is correct. And that, of course, is before your Honor by virtue of the appearance of Mr. Okrand on behalf of certain defendants.

The Court: Yes.

Mr. Hurley: He has identified them and indicated their interests. In addition, your Honor

(Testimony of Dr. W. S. Ohira.)

has before you the amended complaint in condemnation which enumerates all of the defendants and states the parcels in which they have an interest. And in addition your Honor has before you the original complaint in condemnation, I mean, the original declaration of taking and the amended declaration of taking and several supplemental declarations of taking.

Mr. Rosensweig is familiar with the details of this case and I believe that is correct, is it not, Mr. Rosensweig?

Mr. Rosensweig: Yes. [56]

The Court: You must establish or prove. The complaint does not establish or prove.

Mr. Hurley: They are taken *pro indefenso* to the extent they are not denied by the answer of the defendants.

The Court: That is true. However, you can supply the record with all of that.

Mr. Hurley: We are glad to do it. I merely wanted to be sure that the technical position of the plaintiff was understood.

Mr. Okrand: Would counsel for the plaintiff want me to read off the names and parcel numbers? Or would you care to do it?

Mr. Hurley: You can read it, and I will check with you; and if it is incorrect, I will—

Mr. Okrand (Interposing): Parcel No. 290—

The Court: Just a moment. I think we should have a little recess at this time.

(Testimony of Dr. W. S. Ohira.)

Mr. Hurley: Very well, your Honor.

(Brief recess.)

Mr. Okrand: When we left off, your Honor, I think I had been sort of chosen as spokesman to give the information to the court as to the names of the defendants to be identified with the particular parcel numbers.

I will go on from there.

Parcel No. 290 was owned by Southern California Fishermen's [57] Association.

Parcel No. 294 was owned by Dr. W. S. Ohira.

Parcel No. 314 was owned by Koto Yamamoto.

Parcel No. 326 was owned by M. Iwasaki;

Parcel No. 338 by Masso Seiko, now deceased, and so to the parcel is owned by his wife Roku, R-o-k-u;

Parcel 354 by Ben Maeda, M-a-e-d-a;

Parcel 355 by Sen Tanaka;

Parcel 356 by Miyoji Kawasaki, K-a-w-a-s-a-k-i—

Mr. Hurley: How do you spell that first name, for the reporter, too?

Mr. Okrand: M-a-y-o-j-i. I think he has a list there.

Parcel 357 by Naga Nomura;

Parcel 358 by Yosaburo Hama;

Parcel 362 by T. Koiso;

Parcel 366 by T. Nonoshita;

Parcel 367 by Jim Teizo Hatashita;

Parcel 368 by K. Nakamura; and

Parcel 373-A by T. Koiso.

Mr. Hurley: That is correct.

(Testimony of Dr. W. S. Ohira.)

Mr. Okrand: That concludes what we have, your Honor.

The Court: Well, I do not think there is any need of taking this case under submission.

Mr. Okrand: It has been pretty thoroughly argued thus far, I think. [58]

Mr. Hurley: The government will waive argument.

The Court: Will that be a judgment for one amount? How do you want that judgment?

Mr. Hurley: If the court please, if your Honor wishes (and I merely make this by way of suggestion) the court could indicate the judgment would be for the plaintiff on the basis of the issues and that the plaintiff be instructed to prepare findings of fact and conclusions of law which will be submitted, a draft of the judgment, to the defendants' counsel. And if you wish to settle that, we can do that at a later date.

The Court: Well, I understand that. But in preparing your findings, will you—

The Clerk (Interposing): The court will have to make a finding of value as to each parcel.

Mr. Hurley: Yes.

The Court: A finding as to each parcel and naming the individual, is that correct?

Mr. Hurley: That is correct. That is correct, because your Honor is setting as the jury; so we must have a finding as to each parcel, naming each parcel.

The Court: Then the judgment will be in favor of these respective defendants named, as named by

(Testimony of Dr. W. S. Ohira.)

counsel for the defendants, or whomsoever is entitled to receive the award.

Mr. Hurley: Yes, for the respective parcels.

The Court: For the parcels involved.

Mr. Hurley: That is correct.

The Court: In the amounts as testified to by the witness as representing the removal value of the property.

Mr. Hurley: Your Honor, that is the correct instruction in the preparation, and I shall so prepare them.

The Court: You will prepare a finding, and also as to 373-A you will, by that time, have arrived at that valuation.

Mr. Okrand: We believe so, your Honor.

The Court: What else is there to be placed in the record? Anything else?

Mr. Hurley: The findings of fact and conclusions of law.

Mr. Okrand: And the judgment.

Mr. Hurley: And we will prepare a draft of the judgment and present that at the time of the findings of fact and conclusions of law are prepared.

The Court: What do you want? Ten days? Fifteen days?

Mr. Hurley: Ten days will be ample, sir.

The Court: Ten days to prepare your findings, and—

Mr. Hurley: I will submit them to Mr. Okrand representing the defendants within seven days: so

(Testimony of Dr. W. S. Ohira.)

he will have three days to examine them and then if we have any differences, we [60] will come in at that time and settle them.

Mr. Okrand: I am sure the form will be as according to law.

Mr. Hurley: Thank you.

The Court: Now, you will supply the record with a statement from the appraiser?

Mr. Hurley: Yes, sir, we will do that, sir.

The Clerk: Is that to be received by me and marked as an exhibit?

Mr. Hurley: Yes.

The Clerk: Government's Exhibit No. 1?

The Court: Is it stipulated that it may be marked an exhibit?

Mr. Hurley: Yes.

Mr. Okrand: We will so stipulate.

The Court: A joint exhibit?

Mr. Hurley: A joint exhibit, yes.

The Court: Very well.

Mr. Hurley: Do you wish it signed and verified by the witness, sir?

The Court: Yes, I think he should certify that this statement is in accordance with his testimony which will be detailed as set out in the exhibit.

Mr. Hurley: Yes, sir.

(Whereupon, at 3:58 o'clock p. m. August 12, 1947, the hearing in the above-entitled matter closed.) [61]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 15th day of October, A. D., 1948.

/s/ ROBERT T. DOIDGE,
 Official Reporter.

[Endorsed]: Filed Nov. 22, 1948.

[Endorsed]: No. 11956. United States Court of Appeals for the Ninth Circuit. Southern California Fishermen's Association, et al., Appellants, vs. United States of America, Appellee. Supplemental Transcript of Record, Appeal from the United States District Court for the Southern District of California, Central Division.

Filed November 22, 1948.

/s/ PAUL P. O'BRIEN,

Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

Docket No. 11956

UNITED STATES OF AMERICA,

Plaintiff,

vs.

40 ACRES OF LAND IN LOS ANGELES
COUNTY, et al.,

Defendants.

DESIGNATION FOR THE PRINTING OF ALL
MATTER DESCRIBED IN COUNTER-
DESIGNATION OF CONTENTS OF REC-
ORD ON APPEAL AS AMENDED BY
WITHDRAWAL OF ITEM 3 OF SAID
COUNTER-DESIGNATION BY APPELLEE

To the Clerk of the above entitled Court:

Pursuant to Rule 19 (6) of the rules of this Court, Appellee hereby designates as the parts of the record it believes necessary for consideration on appeal and upon which it intends to rely the following:

All of the record as certified to this Court by the Clerk of the District Court for the Southern District of California pursuant to the counter-designation of contents of record on appeal filed August 17, 1948, as modified by the withdrawal of Item 3 thereof, which matters designate in the counter-

designation of the appellants as so modified it does hereby designate for printing as a part of the record hereof.

/s/ JAMES M. CARTER,
United States Attorney.

[Endorsed]: Nov. 22, 1948. Paul P. O'Brien,
Clerk.

No. 11956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA FISHERMANS ASSOCIATION, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

A. L. WIRIN, and

FRED OKRAND,

257 South Spring Street, Los Angeles 12.

Attorneys for Appellants.

FILED

FEB 21 1948



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No. 11956

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SOUTHERN CALIFORNIA FISHERMANS ASSOCIATION, *et al.*,
Appellants,

vs.

UNITED STATES OF AMERICA,

Appellee.

BRIEF OF APPELLANTS.

Jurisdiction.

This is an appeal from a final Judgment and Decree of Condemnation of the District Court of the United States for the Southern District of California, Central Division, entered on April 13, 1948 [R. 27-30] awarding appellants certain sums as compensation for property taken by the appellee under its power of eminent domain.

The Trial Court made Findings of Fact and Conclusions of Law [R. 20]. No written opinion was rendered.

The District Court had jurisdiction under the provisions of the Act of August 1, 1888 as amended (25 Stat. 357, 40 U. S. C. 257).

This Court has jurisdiction of this appeal under the provisions of 28 U. S. C. 1291 and 1294(1) and Rule 81(a)(7), Federal Rules of Civil Procedure.

Statement of the Case and Questions Involved.

FACTS.

Shortly after Pearl Harbor the Navy Department of the United States found it necessary to acquire facilities on certain lands in Los Angeles Harbor known as Terminal Island [R. 3, 8]. The Appellants all had certain interests in the land thus taken [R. 9, 21] which interests, except as to the value thereof, the Appellee recognizes [R. 9]. In its complaint the Appellee sought to condemn each and every estate and interest in the land taken [R. 11, 12].

The particular properties owned by each Appellant consisted of buildings, residences, and improvements made by them to the land, securely attached thereto and of a permanent and substantial nature [R. 22, 78]. These buildings and structures varied as to each parcel and as to each Appellant but in general they consisted of dwelling houses, meeting halls, office buildings, stores, and the usual sheds and garages that go therewith [R. 35 *et seq.*].

The Appellants occupied the land in question and constructed the buildings thereon following their entry on the

land under so-called "Revocable Permits" given them by the City of Los Angeles [R. 15],¹ the owner of the fee [R. 21, 22]. Under these permits, Appellants had the right to and did construct the permanent improvements [R. 21, 22], and said improvements were solely the property of Appellants [R. 22].

There are 14 Appellants and 15 parcels of land, one Appellant, T. Koiso, owning two of the parcels [R. 23]. The land and buildings occupied by the Appellants at the time of the taking were all part of a then thriving community [R. 89]. Each of the Appellants had occupied the land under these revocable permits for many years; some as long as 18 years [R. 35, 54], and none for any shorter time than 3 years [R. 21].

On various dates prior to February 21, 1942, but in each case less than thirty days prior thereto, at the request of the United States Navy Department [R. 16, 22, 23], the City of Los Angeles cancelled all the revocable permits and ordered Appellants to remove themselves and their improvements from the land within 30 days [R. 15, 22]. Before the 30 day periods had expired and again at the request of the United States Navy Department [R. 22, 23], Appellee instituted this action, obtained an

¹The "Revocable Permits," a copy of which was attached to the Stipulation of Facts [R. 16, 17], do not appear in the printed records. They provided, however, *inter alia*, that the City of Los Angeles could revoke the permits on 30 days' written notice and that the Appellants could construct and would own the improvements. [R. 21, 22.]

order for immediate possession of Appellants' property, took possession of said property and removed Appellants therefrom forthwith [R. 15, 22]. Appellee also at the same time took possession of the land belonging to the City of Los Angeles on which Appellants' property was located [R. 4, 5, 11, 16].

Appellants were unable by reason of their removal to remove their structures and improvements [R. 23] and they are no longer present on the land [R. 16].

At the trial the parties differed as to the theory of evaluation that should be applied. Appellees claim, and the trial court agreed, that the proper theory is the value of the buildings, separately considered, without regard to and as removed from the land [R. 25]. Appellants claim that the proper theory is the value of the buildings as a part of the land [R. 79, 80, 89].

However, the parties agreed on the actual figures as to the evaluation on either theory [Joint Exhibit 1, R. 35 *et seq.*]² and the trial court made findings as to the valuation on both theories [R. 23].

²In this Joint Exhibit, the value as a part of the land is referred to as "Valuation of Improvements in Place" and the value as removed from the land is referred to as "Removal or Salvage Value of Improvements." [E.g. R. 36.]

Questions Involved.

1. Where there is more than one owner of real property and the Government takes all the interests therein, in awarding just compensation to the owner of the buildings and improvements taken, should the evaluation be for the property as a "whole" leaving to the parties whose property is taken, or to the court if the parties cannot agree, to decide their respective interests in the award, or should the award be made piecemeal of the respective interests without regard to the enhanced value given each interest by reason of the presence of the component interests which go to make up the entirety of the property taken?

2. Where the Government condemns all of the interests in the real property and an occupier of land owns improvements thereon which are of such permanent nature that they are a part of said real property and have a value by reason of their being a part of it, can the United States Government avoid paying that value to the owner of the improvements by causing the owner of the fee to cancel the occupier's permission to remain on the land, and then just pay the value of the improvements separate and apart from the land?

Specifications of Error.

1. The Trial Court erred in adopting the theory of evaluation as the value of the property as removed from land.

2. The property should have been evaluated on the theory of the "whole" and appellants awarded compensation for their property as a part of the land.

ARGUMENT.

Summary.

When all of the interests in land are taken under eminent domain, the Government has no concern as to the value of the respective interests but must pay for all that it takes leaving it to the parties or to the court to settle the value of the respective share of each interest in the total award.

The buildings of Appellants were real property. When the condemnor takes buildings which are in reality real property, it must pay for them at the real property value and it cannot be the beneficiary of any private agreement between the landlord and tenant as to the nature of those buildings.

The Government cannot, by a maneuver, force a termination of a landlord-tenant relationship and then take advantage of its own act by claiming that the landlord-tenant relationship having been terminated, the tenant has no interest in the land but owns only bare boards. The amount of the interest of the tenant is of no concern to the condemnor.

I.

The Property Taken by Appellee Must Be Valued on the Theory of the "Whole."

The problem presented to this Court for decision is a simple one, but, unless faulty reasoning is to be indulged in and just compensation not given, the specific facts of the case must ever be borne in mind. The problem is as to what theory of evaluation should be followed where permanent buildings on land, in other words—real property—is owned by one person, the land itself is owned by another, and the government takes both interests.

A. The Rule Applicable Where the Land and Buildings Are Owned by One Person.

At the outset, it is clear that had the buildings and the land been owned by one person, the total amount of the value of these two interests, as each increases or decreases the value of the other, would have to be paid by the Appellee to the owner thereof.

1 *Nichols on Eminent Domain* (2d Ed) 693:

"When a tract of land, upon which buildings have been erected and affixed to the soil so far as to become part of the real estate, is taken by eminent domain, unless some special provision is made for the removal of the buildings, the value of the buildings must be considered in determining the compensation to be awarded to the owner; . . .

". . . In the ordinary case the cost of removing the buildings is almost if not quite equal to the value of the materials, and the owner is entitled to

recover the full value of the buildings. He is not however, entitled to have the buildings valued as they stand on the land as separate items additional to the market value of the land, *nor on the other hand is the condemning party entitled to have the buildings valued apart from the land merely as for the purpose of removal . . .*" (Italics added.)

2 Lewis, *Eminent Domain* (3d Ed.) 1269:

"Ordinarily buildings are a part of the land and when land is taken for a public use the buildings and structures thereon are taken with it and the whole must be paid for. *They are to be valued as a part of the realty and not merely for the materials they contain or what they are worth for removal.*" (Italics added.)

Accord:

United States v. General Motors, 323 U. S. 373;

Jackson v. New York, 213 N. Y. 34, 106 N. E. 758;

In re Postoffice Site in Burrough of the Bronx, 210 Fed. 832 (C. C. A. 2, 1914);

Banner Milling Co. v. State, 240 N. Y. 533, 148 N. E. 668;

City of Los Angeles v. Klinker, 219 Cal. 198, 25 P. 2d 826.

B. The Same Rule Is Applicable Where There Are More Than One Interest in the Land Taken and the Condemnor Takes All of Those Interests.

The question then, is the simple one: Is there a different rule where the ownership of these interests is divided, or does the same rule of evaluation apply as between condemnor and condemnees leaving to the latter or to the court to determine the latter's respective shares in the award?

Appellants submit that the same rule of evaluation applies, especially in this case where it was the act of the condemnor itself which caused the cessation of the landlord-tenant relationship between the appellants and the City of Los Angeles [R. 16, 23]. Particularly is this rule applicable where the appellants' homes and businesses had been on this land for, in some cases, as long as 18 years [R. 35, 54] and presumably would have continued indefinitely had not this condemnation taken place. But irrespective of these special considerations, the rule contended for by Appellants, as will be shown *infra*, is the correct one. Indeed the Trial Court itself was not too satisfied that it had ruled properly and said: "I am not so sure that I am correct in that (removal value) ruling" [R. 103]. Appellants submit that their position is the proper one and the one which affords just compensation, while that of the appellees and of the lower court is unreasonable, unjust, and contrary to the authorities.

The principle is well established that:

“A condemnation proceeding is an *in rem* proceeding and when land is taken in which separate interests or estates are owned by two or more persons, as between the public and the owners, it is regarded as one estate. One award as just compensation for the entire value of the land is made and it stands in place of the property appropriated as the equivalent thereof. The distribution of the award between the owners of separate interests or estates is a matter wholly between them and the public is not concerned therewith.” (Citing many cases.)

Bogart v. United States, 169 F. 2d 210, 213 (C. C. A. 10, 1948).

The Appellee, United States, cannot blow both hot and cold. It cannot claim in one case, when it is advantageous so to do, that the proper theory is the valuation as a whole, and then in another identical case, again, when it is advantageous so to do, that that theory has suddenly become improper.

In *Eagle Lake Improvement Co. v. United States*, 160 F. 2d 182 (C. C. A. 5, 1947), the United States properly contended for and the trial and appellate courts followed the theory of the value of the whole. In that case the question was presented as to:

“Whether, when land upon which there are outstanding mineral leases is condemned in fee simple, it is error to admit testimony of the market value of the property as a whole without separating such testimony into mineral value and surface value;
. . .”

Answering that question in the negative, the court said (160 F. 2d at 184):

“There is no merit in the contentions of appellants (condemnees) that the owners of mineral interests were entitled to a separate trial and that evidence of the market value of the property as a whole was not admissible. A condemnation proceeding is an action *in rem*. It is not the taking of rights of designated persons, but *the taking of the property itself*. Duckett & Co. v. United States, 266 U. S. 149, 151, 45 S. Ct. 38, 69 L. Ed. 216. When property is condemned, the amount paid for it stands in the place of the property and represents all interests in the property acquired. United States v. Dunnington, 146 U. S. 338, 350, 353, 13 S. Ct. 79, 36 L. Ed. 996. The sum determined to be due for the taking is apportioned between the claimants, but, ‘as between the condemner and the condemnee, the property is valued as a whole.’ State of Texas v. Harris County, etc. Navigation District, 5 Cir., 158 F. 2d 861, 865; Meadows v. United States, 4 Cir., 144 F. 2d 751; Silberman v. United States, 1 Cir., 131 F. 2d 715; cf. City of Waco v. Messer, Tex. Civ. App., 49 S. W. 2d 822.”

Accord:

United States v. 19,573.59 Acres of Land, 70 Fed. Supp. 610, 612 (D. C. Neb. 1947).

There is no reason or justification for Appellee to claim that a different rule should be followed in the case at bar.

Appellee has fallen into error in the instant case because it has forgotten that it condemned *all* the interests in the real property here involved and not merely the interests

of the Appellants. Had the latter been the case, a totally different rule might be applicable.

The distinction is succinctly illustrated in the case of *Messer v. United States*, 157 F. 2d 793 (C. C. A. 5, 1946). That case was decided by the same court that decided the *Eagle Lake* case, *supra*. The two cases, taken together, point up the two different principles to be applied depending upon the facts before the court. In the *Messer* case the government condemned only the interest of the licensee and not the interest of the owner of the fee. In awarding the compensation to the condemnee licensee for her loss of the buildings she was unable to remove, the trial court permitted the jury to take into consideration the fact that the condemnee would have incurred certain expenses of removal had she been permitted so to do. The Appellate Court held this was proper and in answer to condemnee's argument that she was entitled to a valuation of the buildings as a part of the land and valued as a part of the whole said (157 F. 2d at 785, note 5) :

"The argument of appellant fails to distinguish between the condemnation of all interests in property and the condemnation of some of the interests. Where the case is the former, the Government is interested in the award of a lump sum for all the interests taken, and not in the division of the lump sum among the owners of the interests. See *United States v. 25,936 Acres of Land in Borough of Edgewater*, 1946, 3 Cir., 153 F. 2d 277. Where, as here, the Government settles with the owner of one interest, the question of compensation for all interests is irrelevant; only the question of just compensation for the interest taken concerns the Government."

Thus it is established that where, as here, the Government has taken all the interests, it was error for the trial court to fail to evaluate on the basis of all the interests taken.

C. The Relationship Between the City of Los Angeles, as Owner of the Fee, and the Appellants, as the City's Tenants Is of No Concern to the Appellee as Condemnor.

In determining the value of property taken by eminent domain the condemnor and condemnees stand in the relationship of vendor-purchasers and not landlord-tenant.

City of Los Angeles v. Klinker, 219 Cal. 198, 25 P. 2d 826;

Cf. R. Barcroft & Sons Company v. Cullen, 217 Cal. 708, 20 P. 2d 665.

As a third party vendee, therefore, Appellee cannot take advantage of any private agreement as between the landlord and tenant as to the nature of the property, nor can Appellee do this by a separate settlement with the City [R. 16]. The property taken was real property and must be paid for as such.

This principle is established by many cases.

In *United States v. Seagren*, 50 F. 2d 333, 335 (C. C. D. C. 1931), the court said:

"So, in this case, we are not dealing merely with a tract of land, but with the persons holding interests therein and the verdict as confirmed allows to the landlord and to the tenant the appraised value of each estate.

"And so the agreement for removal made by these parties at another time, for another purpose, and af-

fecting no interests but their own, must be rejected here as irrelevant, when set up by the United States to control its condemnation proceedings against the tenant's interest in the land . . .

“. . . the United States contends that the tenant here has lost nothing by the taking of the property.

“He reserved the right to remove his structures whenever the landlord terminated his tenancy; now that the United States has terminated his tenancy by taking the land, he may exercise his right and remove his structures.

“Nothing has been taken from him. Only his performance of an inevitable obligation has been accelerated.

“But much the same argument could be made in support of murder, for all that any murderer ever did was to accelerate the debt that every mortal owes to nature.

“If the structures here in question had been built by the landlord, they would have been taken and paid for by the government without question, as the government concedes they are now part of the realty. *Is the tenants' reserved power of removal as against the landlord's termination of the lease to work a forfeiture in favor of the government? We think not.*

“The inherent character of the structures is real estate; no agreement can change the character, though the landlord may waive the right which might otherwise accrue to him from the character of the structures placed upon the land . . .

“We find the controlling rule well stated in Nichols on Eminent Domain: ‘It frequently happens that, in the case of a lease for a long term of years, the tenant erects buildings upon the leased land and puts

fixtures into the building for his own use. It is well settled that, even if the buildings or fixtures are attached to the real estate and would pass with a conveyance of the land, as between landlord and tenant they remain personal property, and, in the absence of special agreement to the contrary, may be removed by the tenant at any time during the continuation of the lease provided such removal may be made without injury to the freehold. *This rule is entirely for the protection of the tenant and cannot be worked by the condemning party.* If the buildings or fixtures are attached to the real estate, they must be treated as real estate in determining the total award, but in apportioning the award they are treated as personal property and credited to the tenant.'” Nichols on Eminent Domain (2d Ed. Vol. 1, §234.) (Italics added.)

In *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 Pac. 737, the property in question was owned by Fred T. Hughes who had leased the property to Hoover Nursery Company for the purpose of operating a nursery. The City sought to condemn the property. The lease to the Hoover Nursery Company provided that the lessee had the privilege of growing and selling nursery stock. The Court said that (p. 737):

“It has often been held that property affixed to land which, as between the parties shall be deemed to be personal property, still retains its natural character of realty as to third persons.”

The court determined that the Hoover Nursery Company had an additional interest in the real property sought to be condemned to the extent that it was the owner of

the trees and shrubs planted and growing on the land, that these constituted an interest in the land in the nature of an improvement and the lessee was entitled to compensation for this interest on the taking of the real property by the City and that compensation for this interest should go to the lessee, the Hoover Nursery Company, and not to the owners of the fee.

In *In re Allen Street and First Avenue*, 256 N. Y. 236, 243, 249, 176 N. E. 377, 379, 382, the court said in a case closely analogous to the instant one:

“ . . . In this case, the clause of the lease which provided for its termination upon the vesting of title to the land in the city evidences an agreement between landlord and tenant that the tenant shall receive out of the award *no compensation for his leasehold interest*. Even so, the tenant retains the right to compensation for his interest in any annexation to the real property which, but for the fact that the real property has been taken, he would have the right to remove at the end of his lease (citing cases). Towards the sovereign exercising the power of eminent domain, the agreement of the parties could have no effect and was not intended to have effect . . .

“The city must pay the value of what it takes. To the extent that the value of the real property as a whole is enhanced by the fixtures annexed thereto, the value of the fixtures must be included in what the city pays, and the tenant is entitled to part of the award, not because the fixtures added to the value of the leasehold, but because they belonged to him and

their value enters into the value of what the city has taken.” (*Italics added.*)

In *Carlock v. U. S.*, 53 F. 2d 926, 927 (C. C. D. C. 1931), the court holds:

“It is a fundamental principle, governing condemnation proceedings, where several interests are involved, such as estates for life or in remainder, or leasehold, or in reversion, in the property to be condemned, all should be combined in determining the value of the fee, after which the total value of the fee can be subdivided in satisfaction of the values fixed upon the various interests involved.”

In *City of St. Louis v. Rossi*, 333 Mo. 1092, 1108, 64 S. W. 2d 600, 607, it was held:

“ . . . The rule they [commissioners] adopted for valuing improvements (difference between the cost of removal and the value of salvage) is not correct. They should find and allow, as damages for the land taken, the value of such land with the buildings thereon as a whole; that is what the land, improved as it was on March 26, 1919, was then worth. They should, therefore, as to buildings or other improvements affixed to the soil so as to become real estate, instead of valuing the land and buildings separately, consider the amount which such buildings add to the market value of the land taken and arrive at the value of the whole (injury to buildings on land not taken, if any, should be considered in connection with consequential damages) *without regard to who put the buildings there or the right to remove them.*

These are matters to be considered when it comes to apportioning the damages between the owners and lessees, but do not concern the commissioners.” (Italics added.)

And in *City of Ladue v. St. Louis Public Service Co.*, 1943 Mo. App. 168 S. W. 2d 966, 970, it was held that the tenant whose interest was ended and who could not remove the buildings

“should not be limited to the salvage value, nor should her share of the award be reduced to the cost of moving the buildings. She was entitled to the market value of her buildings, ascertained on the basis of what they were worth for the use to which they were employed as they stood upon the land.”

Other cases are cited in the footnote.³

Just as in *United States v. Welch*, 217 U. S. 333, 339,

“the value of the easement cannot be ascertained without reference to the dominant estate to which it is attached,”

so here, the value of the improvements cannot be ascertained without reference to the land to which they are attached.

³*People v. Church*, 57 Cal. App. 2d (Supp.) 1032, 136 P. 2d 139; *St. Louis v. St. Louis, etc., Ry. Co.*, 266 Mo. 694, 182 S. W. 750; *Mayor, etc., of Baltimore v. Latrobe*, 101 Md. 621, 61 Atl. 203; cf. *Burt v. Merchants Ins. Co.*, 115 Mass. 1, 15.

Conclusion.

The lower court erred in its theory of evaluation and in so doing deprived Appellants of just compensation for their property.

The judgment should be reversed and the lower court ordered to enter judgment based on the theory of the whole and to award Appellants compensation for their property as a part of the land.

Respectfully submitted,

A. L. WIRIN, and

FRED OKRAND,

Attorneys for Appellants.

No. 11,956

In the United States Court of Appeals
for the Ninth Circuit

SOUTHERN CALIFORNIA FISHERMAN'S ASSOCIATION, W. S.
OHIRA, KOTO YAMAMOTO, M. IWASAKI, ROKU SEIKO, BEN
(BENKICHI) MAEDA, SEN TANAKA, MIJOJI KAWASAKI, NAGA
NOMURA, YOSABURO HAMA, T. KOISO, T. NONOSHITA, JIM
TEIZO HATASHITA AND K. NAKAMURA, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA

BRIEF FOR THE UNITED STATES, APPELLEE

A. DEVITT VANECH,

Assistant Attorney General.

JAMES M. CARTER,

United States Attorney,

Los Angeles, California.

JOHN F. COTTER,

FRED W. SMITH,

ELIZABETH DUDLEY,

Attorneys, Department of Justice,

Washington, D. C.

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The district court correctly ruled that value of buildings as removed from the land constitutes just compensation to appellants for the taking of buildings which they were under the necessity of removing from the land condemned	4
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**In the United States Court of Appeals
for the Ninth Circuit**

No. 11956

SOUTHERN CALIFORNIA FISHERMAN'S ASSOCIATION, W. S.
OHIRA, KOTO YAMAMOTO, M. IWASAKI, ROKU SEIKO, BEN
(BENKICHI) MAEDA, SEN TANAKA, MIJOJI KAWASAKI, NAGA
NOMURA, YOSABURO HAMA, T. KOISO, T. NONOSHITA, JIM
TEIZO HATASHITA AND K. NAKAMURA, APPELLANTS

v.

UNITED STATES OF AMERICA, APPELLEE

*UPON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA*

BRIEF FOR THE UNITED STATES, APPELLEE

OPINION BELOW

The district court did not write an opinion. Its findings of fact and conclusions of law appear at R. 20-26.

JURISDICTION

This is an appeal from a judgment entered on April 13, 1948, in a condemnation proceeding instituted by the United States (R. 27-30). On May 24, 1948, the defendants filed notice of appeal (R. 31).

The jurisdiction of the district court was invoked under the Act of August 1, 1888, 25 Stat. 357, as amended, 40 U. S. C. sec. 257; Title II of the Act of December 17, 1941, 55 stat. 810, 815, and the Act of December 26, 1941, 55 Stat. 862 (R. 4-5). The jurisdiction of this Court rests upon 28 U. S. C. sec. 1291.

QUESTION PRESENTED

Where improvements have been placed upon lands by a party who has only a revocable permit from the fee owner, which permit provides that it may be cancelled by the fee owner by serving a thirty-day notice and that the improvements are owned by the permittee who may remove them during the thirty days following such notice of revocation, and the United States condemns the property after service of such notice by the fee owner but before expiration of the thirty days, must the United States, in making just compensation for the improvements taken, pay to the owner thereof more than the value of the improvements as removed from the land?

STATEMENT

The facts in this case are not in dispute. On February 21, 1942, the United States instituted this proceeding to condemn certain lands on Terminal Island in Los Angeles Harbor for the use of the Navy Department (R. 3, 8, Fdg. IV, R. 22).¹ The lands so condemned were owned in fee by the City of Los Angeles (Fdg. I, R. 21).² For varying periods of time prior to institution of this proceeding the appellants occupied fifteen of the parcels condemned under revocable permits issued by the Board of Harbor Commissioners of the City of Los Angeles. These permits allowed the defendants to occupy and improve the property. They further provided that the city could cancel the permits by giving the occupants thirty days' notice to move, and that any improvements constructed by the permittees remained their property and could be removed by them within the thirty-day period following such notice. (Fdg. II, R. 21-22.)

Appellants had constructed buildings and structures upon the premises occupied under such permits (Fdg. III, R. 22). The city of Los Angeles, at the request of the Navy Department, served notices of revocation on appellants prior to institution of this proceeding on February 21, 1942. How-

¹ The original complaint does not appear in the printed record.

² The interest of the city of Los Angeles had already been settled prior to trial of the issue of value of appellants' improvements, and the city has no interest in this appeal (Stip., R. 16).

ever, the district court on February 25, 1942 (Judge Hollzer, presiding) granted the Government an order of immediate possession effective after February 27, 1942, pursuant to which the Government took possession of the land and structures.³ This occurred prior to expiration of any of the notices of revocation, and as a result appellants were unable to remove their structures. (Stip., R. 15, Fdgs. IV, V, R. 22-23.)

The Government having taken the structures of appellants, it filed an amended complaint on March 16, 1942, covering those interests and asking a determination of just compensation therefor (R. 2-13).

On August 12, 1947, issue having been joined, the cause came on for trial before Judge Weinberger. While the issue was just compensation for the improvements, the only difference between appellants and the United States, below and here, is as to the basis of valuation. Appellants contend that the improvements should be valued as part of the land, without regard to the fact that when the Government condemned they were under a requirement to remove the improvements, and the Government contends that the true measure of value is the value of the improvements as removed. The parties are agreed as to the respective values for each set of improvements on either theory (Appellants' Br., p. 4; Joint Exhibit 1, R. 35). These values for each parcel are set out in Fdg. VI, R. 23.

At the trial the court below ruled that the value of the improvements as removed from the land was the proper basis of valuation (R. 84).⁴ Following trial the court entered its findings and conclusions. The court concluded that appellants were entitled to the value of the improvements as removed from the land (Concl. V, R. 25) and entered judgment accordingly (R. 27). Appellants thereafter took this appeal.

³ The Government removed the structures after it took possession (Stip., R. 16). Presumably the exigencies of national defense did not permit the acquisition of *possession of the land* to be delayed until the thirty-day notices expired.

⁴ This was in accord with an earlier pretrial ruling by Judge Weinberger on the point, and prior to that Judge Hollzer had made the same ruling (R. 18-19).

ARGUMENT

The District Court Correctly Ruled That Value of Buildings as Removed from the Land Constitutes Just Compensation to Appellants for the Taking of Buildings Which They Were Under the Necessity of Removing from the Land Condemned

The only question presented on this appeal is whether, as appellants contend, the fact that they could be compelled to remove the buildings from the land, and were actually under a requirement to do so at the time the Government took the buildings, must be ignored in determining compensation for the taking. That question is answered by resort to elementals of condemnation law.

When the United States takes private property for a public use, the Fifth Amendment requires that the Government pay just compensation. It is the "owner's loss" which must be compensated for. *United States ex rel. T. V. A. v. Powelson*, 319 U. S. 266, 281 (1943). The Constitution "merely requires that an owner of property taken should be paid for what is taken from him. * * * And the question is what has the owner lost, not what has the taker gained." *Boston Chamber of Commerce v. Boston*, 217 U. S. 189, 195 (1910). And as compensation for appellants' loss they are entitled to receive market value fairly determined. *United States v. Miller*, 317 U. S. 369, 374 (1943).

Applying these principles to the instant case, what was taken from appellants consisted of buildings placed upon lands of the city of Los Angeles under revocable permits. Appellants never had more than ownership of buildings which they could be required at any time to remove within thirty days. And in this case the removal notices had already been served when the taking occurred.⁵ It is absurd to argue that the market value of buildings is the same

⁵ At Br. 9 appellants suggest that the Government's liability should be affected by the consideration that "it was the act of the condemnor itself which caused the cessation of the landlord-tenant relationship." The proposition that the necessity of taking property upon which a landlord-tenant relationship exists, and the consequent termination of that relationship, should operate to penalize the Government and require it to compensate owners for anything more than they have lost is of course untenable.

regardless of whether the owner of the buildings has a legal right to maintain them on another's land for thirty days, for six months, or for six years, or, as in the case where the owner of the land also owns the buildings, permanently. Yet that was appellants' position below (R. 95) as it is here.

Appellants are simply asking compensation for a greater loss than they suffered. They contend that when the Government condemns property the nature and limitations of an owner's title must be ignored in determining what compensates him for his loss. The proposition answers itself, but it was long ago answered by the Supreme Court. *Boston Chamber of Commerce v. Boston*, 217 U. S. 189 (1910). More recently, the decision in *United States v. Petty Motor Co.*, 327 U. S. 372 (1946) is conclusive that a person's compensation is limited by the nature of the legal interest he has in the property. In that case the Government condemned property occupied by tenants who were legally entitled to remain in possession for only a short time. The trial court, however, had allowed compensation based upon the length of time which, absent the Government's taking, they might have been permitted to remain in possession.⁶ This was affirmed by the circuit court of appeals. *United States v. Petty Motor Co.*, 147 F. 2d 912 (C.C.A. 10, 1945). But the Supreme Court reversed, holding that the compensation for such tenants should be based upon only such time as they had a legal right to remain on the property, and quoted from *Emery v. Boston Terminal Co.*, 178 Mass. 172, 185, 59 N. E. 763, 765 (1901), as follows:

* * * The evidence merely showed that the landlords and tenants were mutually satisfied and were likely to keep on together. It added nothing except by way of corroboration to the testimony that they both intended to keep on. Changeable intentions are not an interest in land, and although no doubt such intentions may have added practically to the value of the petitioners' holding, they could not be taken into account

⁶ It may be noted that appellants also seek to inject into this case (Br. 9) the circumstance that they had occupied the lands for long periods "and presumably would have continued indefinitely had not this condemnation taken place."

in determining what the respondent should pay. They added nothing to the tenants' legal rights, and legal rights are all that must be paid for. * * *

So here appellants had no legal right to remain on the property. Hence the case cannot be treated as if they did have such a right. Appellants were entitled to compensation for the buildings based upon consideration of the necessity of their removal. To ignore the fact that appellants were under the necessity of removing the buildings would result in permitting recovery as if they had a permanent right in the land. Obviously in the instant case appellants could not, as against the fee owner, share in an award made for the entire property on the assumption that they had a right to remain in possession. For example, a tenant whose lease provides that upon condemnation it may be terminated at the option of the lessor, is not entitled to share the award. *United States v. 21,815 Square Feet of Land*, 155 F. 2d 898 (C.C.A. 2, 1946); *Goodyear Shoe Machinery Co. v. Boston Terminal Co.*, 176 Mass. 115, 57 N. E. 214 (1900); *United States v. 96,900 Square Feet more or less*, 65 F. Supp. 833 (S.D. N.Y., 1946). In the instant case the Government has settled with the fee owner (R. 16), but that circumstance does not increase appellants' rights. As the court said in *United States v. Petty Motor Co.*, 327 U. S. 372, 376 (1946), with reference to a similar situation, "There would be no greater right where the landlord has been otherwise satisfied." In this case, if the Government had delayed the filing of the condemnation proceeding until the thirty-day period for removal already in effect had run out, appellants could not have realized more than the removal value of the buildings. That is all that was taken from them by the condemnation. There is no basis for holding that, because governmental necessity moved the United States to proceed before the notices had expired, the Government should pay them more.

Appellants' contention is thus shown to be without any support in reason or justice. Moreover, the question here presented is not one of first impression. It was squarely presented and passed upon in *Messer v. United States*,

157 F. 2d 793 (C.C.A. 5, 1946). There the Government condemned an interest in real property owned by the city of Birmingham, Alabama. Appellant Messer owned a house situated on the property, but she was merely a licensee of the city under a license subject to revocation. There, as here, upon revocation of the license she was entitled to remove her property from the land. There, as here, after institution of the condemnation proceeding, the Government settled with the city for its interest. There, as here, the issue tried was just compensation for the taking of the house. And there, as here, the question the house-owner placed before the court was, as stated by the circuit court of appeals (157 F. 2d, p. 794):

Was it correct for the jury to consider, in its determination of just compensation for the house and other improvements, that the owner was under a duty to the owner of the land to remove them within a reasonable time after notice was given?

And, as appellants concede (Br. 12), the decision in the *Messer* case rejected the contention they make here. Appellants practically concede that the *Messer* decision was correct, but they seek to distinguish it (Br. 11-12) on the ground that in the instant case the Government condemned all interests in the property while in the *Messer* case, they say, "only the interest of the licensee and not the interest of the owner of the fee" was condemned. The *Messer* decision can not be thus avoided. In the first place, it is not true that there the Government did not condemn the interests of the fee owner as well as the interest of the licensee. After institution of the proceeding the Government settled the claim of the city "and the court below dismissed the condemnation proceedings." And in order to make an award to the owner of the house whose claim had not been settled, the court "re-instituted the condemnation proceedings." That is the situation here, except that the court below did not inadvertently dismiss the proceeding while the claim of appellants remained to be adjudicated. Secondly, even if they were right about the facts of the *Messer* case, their attempted distinction lacks merit. That is proven by the

obvious fact that, whether the Government had settled with the city of Los Angeles prior to institution of condemnation proceedings and had limited such proceedings to the interests of appellants, or, as it did in this case (and in the *Messer* case), condemned the interests of the city of Los Angeles and the interests of appellants and thereafter settled with the city, the *loss* suffered by appellants is the same and the *compensation* should be the same in either case.

Appellants argue (Br. 7-13) that the unit rule method of valuation should be used, i.e., the value of the land and buildings as a unit as though both were owned by the owner of the fee in the land. But where, as here, the claim of the fee owner has been settled by the Government, the unit rule is meaningless. *United States v. Petty Motor Co.*, 327 U. S. 372 (1946); *Messer v. United States*, 157 F. 2d 793, 795 (C.C.A. 5, 1946). In such a situation the Supreme Court observed in the *Petty Motor Co.* case (327 U. S. p. 374) that "the value of the use of the totality of the property, which was taken, thus lost all meaning * * *." Counsel for appellee recognized this in the court below. When asked by the court if he were offering to prove the value "of the improvements and the real estate," appellants' counsel stated, "Oh, no, just the improvements. That is all we are considering here." (R. 94.) Appellants never did offer to prove the value of the whole property.

Even if the Government had not settled with the fee owner, the case still would not lend itself to the unit rule method of valuation. At Br. 7-8 appellants cite cases holding that where the Government condemns land upon which improvements stand, and both land and improvements are owned by the same person, the basis of valuation is the market value of both considered as a real property unit. That is unquestionably the law, but the cases cited are inapplicable here since there is not a unity of ownership in the land and the improvements.

From this point appellants progress to the proposition that where there are divided interests in real property the same rule prevails, citing *Bogart v. United States*, 169 F. 2d 210 (C.C.A. 10, 1948); *Eagle Lake Improvement Co. v. United States*, 160 F. 2d 182 (C.C.A. 5, 1947), and *United*

States v. 19,573.59 Acres of Land, 70 F. Supp. 610 (D. C. Neb., 1947). The soundness of these cases is not questioned, but they do not, as appellants claim, support the application of the unit rule to the case now presented. In each of the cases cited the property condemned was first wholly owned in fee by one person, and the fee owner, prior to the condemnation, conveyed a leasehold in the property condemned to another. The property remained a unit, and the fee owner and the lessee each had interests *in the whole*. The lessee owned no part of the property outright and could remove no part of it upon expiration of the lease. Obviously, in such a situation neither the unity of the property nor its value is affected by the creation of the temporary interest.

Here appellants argue that the land and improvements should be valued as though they were all owned by the fee owner. But the land and improvements have never constituted a unit. As stated by appellants (Br. 3, fn. 1) "the city of Los Angeles could revoke the permits on 30 days written notice and that the Appellants could construct and *would own the improvements.*" (Italics supplied.) There is no unit here. The city owns merely the fee and the right to compel removal of the buildings. Appellants own the buildings under the handicap of being required to remove them. To allow an award based on the value that the lands and improvements could command in the open market if they were owned by one person is to require the Government to pay into court an amount greater than the aggregate value of the interests actually existing in the fee owner and the owner of buildings under these restrictions. To do so is to value something simply not in existence. The lack of support for appellants' position in the cases discussed is indicated by the fact that the same court which decided the *Eagle Lake Improvement Co.* case, relied upon by appellants, later decided the case of *Messer v. United States*, 157 F. 2d 793 (C.C.A. 5, 1946), which as shown at p. 6 *supra*. completely rejects appellants' position here.

Moreover, even if the unit rule could be applied to the instant case, it would not result in the value contended for by appellants. Under that rule the buildings are included

to the extent that they enhance the value of the land. It goes without saying that the land here involved could not be enhanced in value by buildings not owned by the fee owner, and under the necessity of being removed by the licensee at the time of the taking, to the same extent as if the buildings were owned by the fee owner.

At Br. 13-19, appellants argue that, notwithstanding the fact that, as between themselves and the city of Los Angeles, the buildings were personal property, they are regarded as realty when the property is condemned. It is true, of course, that when the Government condemns lands upon which are buildings or fixtures owned by a third party having a lease with the right to remove the buildings or fixtures at the expiration thereof, the buildings or fixtures are nevertheless taken by a condemnation of the land and must be compensated for. In other words, the condemnor can not require the owner to remove the buildings or fixtures, or remove them itself and force them upon the owner and thus reduce its liability. So, where a condemnor has contended that a taking of the land was not a taking of buildings or fixtures owned and subject to removal by third parties, the courts have held to the contrary. Such are the cases of *United States v. Seagren*, 60 App. D. C. 183, 50 F. 2d 333 (1931); *City of Los Angeles v. Hughes*, 202 Cal. 731, 262 Pac. 737 (1927); and *In re Allen Street and First Avenue*, 256 N. Y. 236, 176 N. E. 377 (1931) cited by appellee at Br. 13-16. But that is the only question decided in those cases. They do not involve or deal with the question of the basis of fixing the value which the Government must pay the owner of buildings or fixtures required to be removed. That such decisions are inapposite on the question of valuation of the buildings was readily recognized by the Court of Appeals for the Fifth Circuit when it distinguished the *Seagren* decision in *Messer v. United States*, 157 F. 2d 793, 795 (1946).

The only cases cited by appellants (Br. 17-18) which appear to lend the slightest support to their contention are the Missouri cases, *City of St. Louis v. Rossi*, 333 Mo. 1092, 64 S. W. 2d 600 (1933), and *City of Ladue v. St. Louis Public Service Co.*, 168 S. W. 2d 966 (Mo. App. 1943). The facts recited in the first cited case are so uncertain as to render

discussion of the case impracticable. In the *City of Ladue* case the court recognized that the owner of the buildings were involved had no interest in the land, but only a right to remove them (168 S. W. 2d, p. 969). In saying that the owner was entitled to "the market value of her buildings, ascertained on the basis of what they were worth for the use to which they were employed as they stood upon the land" the court did not say that she was entitled to have them valued as though she also owned the land.⁷ Moreover, assuming that to be the meaning of the decision, it is unsound because the owner of the buildings had no right other than to remove the buildings, and to value their use in conjunction with the land is to value a use of which they were not susceptible. Compare *United States v. Sanitary Dist.*, 149 F. 2d 951, 954 (C.C.A. 7, 1945). The only right the owner had in the buildings was the right to remove them; that was all that she lost by the condemnation, and that right was worth to her only the amount which she could have realized by exercise of the right.⁸

To allow other than removal value of buildings to an owner whose sole right in them is limited to their removal is to require the Government to compensate an owner on a basis other than the owner's loss. Whatever may be the rule in Missouri, it is not controlling here, and if the Missouri decisions stand for the proposition advanced by appellants, they are unsound on reason and authority.

⁷ See *Messer v. United States*, 157 F. 2d 793, 795-796 (C.C.A. 5, 1946), where the *City of Ladue* case was rejected as an authority for the contention here made by appellants. Moreover, the *City of Ladue* case was a contest between the fee owners and the owner of the buildings on distribution of an award already determined. Whether the condemnor must pay value of the buildings as though land and buildings were owned by one person was not a question in the case. It seems to have been assumed that the condemnation award was on that basis.

⁸ The Missouri Court of Appeals cited as authority 2 Lewis, *Eminent Domain*, section 726, p. 1269. It is there stated that "They [buildings] are to be valued as part of the realty and not merely for the materials they contain or for what they are worth for removal." But the cases cited in support are all cases where the fee to the land and the buildings *were owned by the same person*. Thus Lewis was not dealing with the situation here presented and is not authority for the proposition for which the Missouri Court cited it.

In federal condemnation proceedings what constitutes just compensation under the Fifth Amendment is a federal question. *United States v. Miller*, 317 U. S. 369, 379-380 (1943). And as shown (p. 4 *supra*), just compensation in federal condemnation proceedings is the value of the owner's loss, not the taker's gain. Applying these principles here, the soundness of the judgment below is manifest.

CONCLUSION

For the foregoing reasons it is submitted that the judgment appealed from be affirmed.

Respectfully,

A. DEVITT VANECH,
Assistant Attorney General.

JAMES M. CARTER,
United States Attorney,
Los Angeles, California.

JOHN F. COTTER,

FRED W. SMITH,

ELIZABETH DUDLEY,

Attorneys, Department of Justice,
Washington, D. C.

MARCH 1949

No. 11957

United States
Circuit Court of Appeals
For the Ninth Circuit.

CALIFORNIA SHIP SERVICE COMPANY and
FIREMAN'S FUND INSURANCE COM-
PANY,

Appellant.

VS.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,
Appellee.

Apostles on Appeal

Upon Appeal from the District Court of the United States
for the Southern District of California,
Central Division

AUG 5 - 1948

PAUL P. O'BRIEN,

CLERK

No. 11957

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in *italic*; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in *italic* the two words between which the omission seems to occur.]

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NAMES AND ADDRESSES OF PROCTORS

For Appellants:

LASHER B. GALLAGHER

458 S. Spring St.

Los Angeles 13, Calif.

For Appellee:

JAMES M. CARTER,

United States Attorney

CLYDE C. DOWNING,

Assistant U. S. Attorney,

600 U. S. Post Office and Court House
Bldg.

Los Angeles 12, Calif. [1*]

United States of America—ss.

To: Warren H. Pillsbury, Deputy Commissioner, 13th Compensation District, and James M. Carter, United States Attorney, and Clyde C. Downing, Assistant United States Attorney, Proctors, Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be held at the City of San Francisco, in the State of California, on the 23rd day of June, A.D. 1948, pursuant to an order allowing appeal filed on May 14th, 1948, in the Clerk's Office of the District Court of the United States, in and for the Southern District of California, in that certain cause No. 7284-M, Central Division, wherein California Ship Service Company, a corporation, and Fireman's Fund Insurance Company, a corporation, are appellants and you are appellee to show cause, if any there be, why the decree, order or judgment in the said appeal mentioned, should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Paul J. McCormick, United States District Judge for the Southern District of California, this 14th day of May, A.D. 1948, and of the Independence of the United States, the one hundred and seventy-second.

[Seal] /s/ PAUL J. McCORMICK,
U. S. District Judge for the Southern District of
California.

Service of a copy of the foregoing Citation, copy of Petition for Appeal, Order Allowing Appeal and Assignments of Error, are acknowledged this 14th day of May, 1948.

/s/ JAMES M. CARTER,

U. S. Atty., Proctors for
Appellee.

By /s/ GERTRUDE M. JOHNSON,
Civil Dkt. Clk. [2]

In the District Court of the United States, Southern
District of California, Central Division

No. 7284-M

CALIFORNIA SHIP SERVICE COMPANY, a
Corporation, and FIREMAN'S FUND IN-
SURANCE COMPANY, a Corporation,
Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,
Respondent.

LIBEL FOR INJUNCTION PURSUANT TO
TITLE 33 USCA, SEC. 921

To: The Honorable District Court of the United
States, Southern District of California, Central
Division:

The Libelants California Ship Service Company,
a corporation, and Fireman's Fund Insurance Com-
pany, a corporation, respectfully show:

Article I.

Libelant California Ship Service Company, at all times herein mentioned, has been and now is a corporation. Libelant Fireman's Fund Insurance Company, at all times herein mentioned, has been and now is a corporation. [3]

Article II.

On the 6th day of December, 1945, one Robert Johnson, Jr., was in the employ of California Ship Service Company, a corporation, as a harbor worker and on said date was working as such harbor worker on navigable waters of the United States at Los Angeles Harbor in the State of California, and on said date the said Robert Johnson, Jr., sustained an injury which caused his death on the same day, to wit, December 6, 1945.

Article III.

Louise Johnson, Sr., was the mother of the said Robert Johnson, Jr., and Robert Johnson, Sr., was the father of said Robert Johnson, Jr. At all times herein mentioned the said mother and father of Robert Johnson, Jr., were and each thereof was and is living. Within the time allowed by law the said Louise Johnson, Sr., filed a claim for a death benefit award.

Article IV.

Libelant Fireman's Fund Insurance Company, a corporation, at all times herein mentioned was the Longshoremen's and Harbor Workers' Compensation Insurance Carrier for said California Ship Service Company, a corporation.

Article V.

On June 5, 1947, the respondent herein made a Compensation Order, awarding a death benefit to the said Louise Johnson, Sr., and certain minor brothers and sisters of the said Robert Johnson, Jr., and a copy of said Compensation Order is as follows: [4]

“Federal Security Agency, Bureau of Employees Compensation, 13th Compensation District. Case No. 2972-176. Claim No. 2516. In the matter of the claim for compensation under the Longshoremen’s and Harbor Workers’ Compensation Act. Mrs. Louise Johnson, Sr., Louise Johnson, Joseph Charles Forest Johnson, Lucille Idel Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson, Romalis Johnson, Mother, Brothers, Sisters and Nephew of Robert Johnson, Jr., deceased, Claimants, against California Ship Service Company, Employer. Fireman’s Fund Insurance Company, Insurance Carrier.

“Compensation Order—Award of Compensation

“Such investigation in respect to the above-entitled claim having been made as is considered necessary, and a hearing having been duly held in conformity with law, the Deputy Commissioner makes the following:

“Findings of Fact

“That on the 6th day of December, 1945, Robert Johnson, Jr., was in the employ of the employer above named at Los Angeles Harbor, in the State

of California in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day the said employee while performing service for the employer as a laborer and engaged at ship repair operations on a completed vessel on navigable waters of the [5] United States at said Harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in death the same day as follows: He fell from a ladder while descending into a tank of the ship, sustaining fatal injury; that the employer furnished the employee with medical treatment, etc., in accordance with Section 7(a) of the said act; that the average weekly earnings of the employee at the time of his injury exceeded \$37.50; that the employee left surviving him and dependent (sic) in fact upon him for support his mother, Louise Johnson, Sr., born December 28th, 1905, and adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson, born February 29, 1929, Edwin Johnson, born July 22, 1930; Hilda Mae Johnson, born March 30, 1932; Harold Johnson, born April 4, 1934; Walter Johnson, born June 22, 1936, and Romalis Johnson, born November 20, 1940; that claimants Louise Johnson, Sr., Lucille Idel Johnson, Edwin

Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson and Romalis Johnson are entitled to a death benefit at the rate of 25 per cent of the average weekly wages of the employee for Louise Johnson, Sr., his mother, and 15 per cent of said weekly wages for each of the said minor brothers and sisters, the share of each minor child to run until such child reached or will reach the age of 18 years, provided, however, that the total allowance to all dependents may not exceed $66\frac{2}{3}$ per cent of the said average weekly wages or \$25.00 a week. That such death benefit at the rate of \$25.00 a week shall be paid to Louise Johnson, Sr., for the support and maintenance of herself and said minor children, commencing with the date of the death of the said Robert Johnson, Jr.; Amount accrued to and including the date of the hearing July 2, 1946, $29\frac{5}{7}$ weeks is \$742.85, no part of which has been paid; that Louise Johnson, a sister born December 11, 1922, was wholly dependent upon the deceased employee at the time of his death for her support but was [6] over the age of 18 years and has not been shown to have been physically or mentally incapacitated from earning her living, and is not entitled to share in said death benefit; that a child of said Louise Johnson, Joseph Charles Forest Johnson, was born October 19, 1945, was a nephew of the deceased employee and wholly dependent upon him for support at the time of his death, but is not within the relationship to the employee within which valid claim may be made for death benefit; that the reasonable expense of

burial of the employee was over \$200.00 and that \$511.75 is owing thereon by claimant to W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles; that claimants are entitled to an allowance of \$200.00 upon said burial expense to be paid direct to said undertaker; that J. Warren Woodville, claimant's attorney, 821 Maison Blanche Building, New Orleans 16, La., has rendered legal service to claimants in the above matter in the present claim for which a fee is approved in the sum of \$65.00 and lien granted thereon on compensation herein awarded.

Upon the foregoing facts, the Deputy Commissioner makes the following:

“Award.

“That the employer, California Ship Service Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimants compensation as follows: To claimants Louise Johnson Sr., Lucille Ideal Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson, and Romalis Johnson, payable to Louise Johnson, Sr., the sum of \$200.00 upon the burial expense, to be paid to W. D. Fisher & Son, Inc., Funeral Director, upon the liability of said claimants therefor.

“To claimant Louise Johnson, Sr., for the benefit of herself and said minor children, the sum of \$742.85 forthwith as of July 2nd, 1946, less, however, the sum of \$65.00 to be deducted therefrom and [7] paid to claimants' attorney J. L. Woodville upon his lien for attorney's fees.

“To said claimant Louise Johnson, Sr., for the benefit of herself and said minor children the sum of \$25.00 a week payable in installments each two weeks beginning with July 3, 1946, until further order of the Deputy Commissioner.

“The claims of Louise Johnson, sister of deceased, and her child, Joseph Charles Forest Johnson, are rejected upon the ground that the said Louise Johnson was over 18 years of age at the time of her brother's death and has not been shown to have been physically or mentally disqualified from earning, and that her child is not within the class of relatives to whom death benefits may be awarded.

“Given under my hand at San Francisco, California, this 5th day of June, 1947.

/s/ WARREN H. PILLSBURY,
Deputy Commissioner, 13th
Compensation District.

WHP:nm”

Article VI.

There were two hearings and only two hearings relating to the said application and said hearings were conducted in the City of New Orleans, State of Louisiana, before Joseph H. Henderson, Deputy Commissioner, and a full and complete copy of the record of said hearings is attached hereto as Exhibit “A” and by reference thereto made a part hereof with the same effect as though set out verbatim herein.

Article VII.

There were no stipulations of any kind or character made by the libelants, or either of them, excepting as set forth in the [8] transcript of the proceedings which is attached hereto as Exhibit "A."

Article VIII.

The award is not in accordance with law for the following reasons:

1. There is no evidence to support the finding that the average weekly earnings of Robert Johnson, Jr., at the time of his injury exceeded \$37.50, and said finding is directly contrary to the stipulation of the parties that the average weekly wage of the decedent at the time of his injury amounted to the sum of \$29.62. (Exhibit "A," pg., lines).

2. There is no evidence to show that there was no surviving wife or child of Robert Johnson, Jr.

3. There is no evidence showing that Louise Johnson, Sr., was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

4. There is no evidence showing that the minor brothers or sisters were or any thereof was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of the said Robert Johnson, Jr.

5. No claim for a death benefit was at any time filed by any person excepting Louise John-

son, Sr., and the deputy commissioner had no power or jurisdiction to make or order any award in favor of any minor brother or sister of Robert Johnson, Jr.

6. The award does not provide that payments are to be continued only during any dependency of Louise Johnson, Sr.

7. The award does not provide that payments are to be continued only during any dependency of the minor brothers and sisters of [9] Robert Johnson, Jr.

8. There are no findings as to why or how Louise Johnson, Sr., was a dependent of Robert Johnson, Jr.

9. There are no findings with reference to whether or not Louise Johnson, Sr., was dependent upon Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

10. There are no findings with references to whether or not the minor brothers and sisters of the deceased were dependent upon the deceased at the time of the injury which caused the death of said Robert Johnson, Jr.

11. The award does not provide that payments are to be continued only during dependency.

12. There is no finding that Robert Johnson, Jr., left no surviving wife or child.

13. There is no substantial evidence to support the findings and award, or either thereof.

Wherefore, libelants pray that the said Compensation Order be set aside and that enforcement thereof be enjoined.

LASHER B. GALLAGHER,
JOHN H. BLACK and
EDWARD R. KAY,

By /s/ LASHER B. GALLAGHER,
Proctors for Libelants. [10]

EXHIBIT "A"

United States Employees' Compensation
Commission

Joseph H. Henderson, Deputy Commissioner
7th Compensation District, New Orleans, La.

Case No. 2972-176

MRS. LOUISE JOHNSON,

Claimant.

against

CALIFORNIA SHIP SERVICE COMPANY,
Employer.

FIREMAN'S FUND INSURANCE COMPANY,
Insurance Carrier.

TRANSCRIPT OF TESTIMONY AT HEARING

Pursuant to notice, this matter was heard before the Honorable Joseph H. Henderson, Deputy Commissioner, United States Employees' Compensation Commission, at New Orleans, Louisiana, at

Room 600, Maritime Building, 203 Carondelet St., on the 4th day of June, 1946.

Appearances: Frank S. Norman, Hibernia Building, New Orleans, La., Attorney for Employer and Insurance Carrier. Claimant not represented by Counsel. [11]

TRANSCRIPT OF TESTIMONY

Deputy Commissioner Henderson: Gentlemen, shall we get started, please? The court reporter will show the hearing started at ten o'clock this date.

The hearing at this time is in respect to a claim for compensation (death benefits) filed by Mrs. Louise Johnson, mother of Robert Johnson, Jr., deceased, and against California Ship Service Company, employer of the said Robert Johnson, Jr., and Fireman's Fund Insurance Company, insurance carrier of said employer, under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended.

This case was transferred to me by the Deputy Commissioner of the 13th Compensation District, at San Francisco, California, with the approval of the United States Employees' Compensation Commission.

On December 18, 1945, the employer reported that Robert Johnson, Jr., one of its employees, was injured December 6, 1945, while working as a laborer on the S/S "California," at Berth 216, Terminal Island, California; that he was descending

a ladder into a tank, lost his balance and fell to the deck of tank, resulting in his death.

On February 11, 1946, a claim for compensation (death benefits) was filed by Mrs. Louise Johnson, of this city, with the Deputy Commissioner at San Francisco.

On February 13, 1946, a copy of said claim was sent to the employer and insurance carrier, by registered mail, for their answer, and on February 20, 1946, answer was filed by Attorney Murray H. Roberts, making a general denial of liability, but on March 22, 1946, on behalf of the insurance carrier, he executed a stipulation admitting and denying certain facts.

At this point I will ask the interested parties if they [12] will stipulate for the record the facts which they are willing to accept and admit without controversy.

Mrs. Louise Johnson, the claimant in this present hearing, is of course present, and I would like to ask her if she is represented by an attorney at this hearing this morning.

The Claimant: No, sir.

Deputy Commissioner Henderson: Are you willing, Mrs. Johnson, to proceed with the hearing this morning without an attorney?

The Claimant: Yes, sir.

(A recess was taken at 10:10 a.m. to discuss the facts with the claimant. The hearing was resumed at 11 a.m.)

Deputy Commissioner Henderson: There are certain facts in this case which may be admitted

by both sides. However, one of the points to be decided is with reference to the average weekly wage of the decedent at the time of his injury.

I have clearly, plainly and in detail explained to Mrs. Louise Johnson and her husband, who is also present with her this morning, why the average weekly wage of the decedent becomes a necessary question in determining what compensation Mrs. Louise Johnson would be entitled to if she is entitled to any compensation at all.

I have shown her statements purportedly having been obtained from the employers for whom the decedent worked in maritime employment in California, and have shown Mrs. Louise Johnson how much the average wage would be, based on those earnings. Mrs. Johnson doesn't fully understand what she would be entitled to under the law, and does not understand how the average weekly wage is computed or is determined.

I explained to her that the most she could get under the [13] law, if she is entitled to anything at all, is \$9.37½ per week, which would be 25% of the maximum average weekly wage of \$37.50 permitted under the law.

Mrs. Johnson and her husband do not understand why she should not get more in compensation than \$9.37½ per week, or a lesser amount if the average weekly wage should be less than \$37.50.

They also have stated that the funeral expenses were so great, that the amount that could be paid under the law on funeral expenses by the employer and insurance carrier being only \$200.00, leaves a

considerable balance on the funeral expenses to be paid by someone, and it is their thought that it would take them so long to pay the remainder of the funeral expense bills, that it would be a long time before Mrs. Johnson could actually receive anything from any compensation that might be paid to her.

Mrs. Johnson has requested that she be allowed additional time in which to give these matters further consideration. She has stated that she would like to consult with someone to advise her with reference to the matter. Is that what you wish to do, Mrs. Johnson?

The Claimant: Yes.

Deputy Commissioner Henderson: Under the circumstances, I think it would be advisable for Mrs. Henderson to consult someone and find out to her own satisfaction just what the facts might be and just what compensation she might be entitled to, if she would be entitled to anything at all.

For that reason I will, while I hate to grant a continuance of the case for that reason alone, I will grant a continuance of this hearing for thirty days, during which time Mrs. Johnson, please listen carefully, during these thirty days I will allow for a continuance of this hearing, you will consult with anybody you wish, and if you wish to bring anybody to my office to [14] find out what is in the record of your case or ask me any questions, that I can answer for them, you are privileged to do so, but when the hearing of your case comes up next

time, you are to be ready to go through with your part of the hearing. Is that clear?

The Claimant: Yes.

Deputy Commissioner Henderson: I will therefore grant a continuance of this hearing for thirty days, and the case will come up again for hearing before me in this same room, on July 2, 1946, beginning at ten o'clock on the morning of that date, at room 600 Maritime Building, 203 Carondelet Street, New Orleans, Louisiana, without further notice to any of the interested parties.

Mrs. Johnson, do you understand now that your case here this morning, is being continued at your request, for four weeks, during which time it is requested that you make such inquiries as you want to make, see anybody you want to see, but you must be ready to go through with your part of the hearing in your case on July 2, 1946?

The Claimant: Yes, sir.

Deputy Commissioner Henderson: Now don't forget it. I will not send you any further notice to be here on July 2. You must be here at that time, at ten o'clock on the morning of Tuesday, July 2, 1946. Do you understand now, Mrs. Johnson; is that clear to you?

The Claimant: Yes, sir.

Deputy Commissioner Henderson: With that understanding, the hearing is continued until July 2, 1946. The court reporter will show the hearing recessed at 11:15 a.m.

(The hearing thereupon recessed at 11:15 a.m., to reconvene at ten o'clock a.m. on July 2, 1946. [15])

Pursuant to notice, this matter was called for further hearing at ten o'clock a.m. on July 16th, 1946, in room 600 Maritime Building, New Orleans, before Hon. Joseph H. Henderson, Deputy Commissioner.

Appearances: Frank S. Normann, Hibernia Building, New Orleans 12, La., Attorney for Employer and Insurance Carrier. Warren Woodville, 821 Maison Blanche Bldg., New Orleans 12, La., Attorney for Claimant.

TRANSCRIPT OF TESTIMONY

Deputy Commissioner Henderson: Gentlemen, shall we get started please? The court reporter will show the hearing commenced at 10 o'clock.

The hearing at this time is a continuation of a hearing started on June 4, 1946, and further continued at request of counsel for defendants July 2, 1946, to this date, in the case of Mrs. Louise Johnson, Claimant, against California Ship Service Company, Employer, and Fireman's Fund Insurance Company, Insurance Carrier of said Employer, in respect to claim for compensation (death benefits) filed by said Claimant on account of the death of her son, Robert Johnson, Jr., under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended.

I notice that Mrs. Louise Johnson is present here

now, and I would like to ask her for the record, if she is represented by an attorney at this hearing?

The Claimant: Yes, sir.

Deputy Commissioner Henderson: And that attorney is Attorney Warren Woodville?

The Claimant: Yes. [16]

Deputy Commissioner Henderson: At this point it will be in order for the interested parties to stipulate for the record the facts that they are willing to admit and accept without controversy.

Mr. Normann: Counsel for the Employer and Insurance Carrier admits and accepts without controversy, the following statement of facts:

1. That on the 6th day of December, 1945, Robert Johnson, Jr., hereinafter called the decedent, was in the employ of California Ship Service Company, at Terminal Island, in the State of California, in the Thirteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act, was insured by Fireman's Fund Insurance Company; that on said day the decedent herein, while performing service for the employer upon the navigable waters of the United States, sustained accidental injury arising out of and in the course of his employment, and resulting in his disability while he was employed as a laborer on the S/S "California," said vessel being then afloat in the waters of the Pacific Ocean, at Berth 216, at Terminal Island, in the State of California, when, while engaged in ship repair operations on said vessel.

he was descending a ladder into a tank and lost his balance and fell to deck of tank and sustained injuries which resulted in his death on December 6, 1945;

2. That written notice of said injury and death was not given within 30 days, but that the employer had immediate knowledge of said injury and death, and that the employer has not been prejudiced by such failure to give such written notice;

3. That the employer furnished the decedent with medical treatment, etc., in accordance with Section 7 (a) of the said Act; [17]

4. That the average weekly wage of the decedent herein, at the time of his injury, amounted to the sum of \$29.62 per week; that full wages were paid for the day of injury and death;

5. That the total amount of the funeral expenses for preparation and burial of the body of the decedent, which was handled by W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles, California, amounted to the sum of \$511.75, of which amount nothing has been paid to the said undertaker by anyone, and another bill amounting to \$192.88 for services rendered by Dennis Mortuary Service, 1940 Eagle Street, New Orleans, which bill has been paid in full by Mrs. Robert Johnson, Sr., the claimant in this case;

6. That the employer and insurance carrier herein have paid nothing as compensation (death benefits) to the claimant herein, and nothing on the burial expenses.

Deputy Commissioner Henderson: Attorney

Woodville, you have heard the facts which counsel for the employer and insurance carrier has stipulated he is willing to accept and admit without controversy. Do you accept those same facts without controversy on behalf of the claimant in this case?

Mr. Woodville: Yes.

Deputy Commissioner Henderson: At this point I will ask Counsel for Defendants to state the issue or issues upon which he desires to be heard.

Mr. Normann: Only on the question of dependency, *vel non*.

Deputy Commissioner Henderson: I will ask Counsel for Claimant to state the issue or issues upon which he desires to be heard.

Mr. Woodville: On the question only of dependency.

Mr. Normann: It is understood, Mr. Henderson, I reserve in behalf of the California Ship Service Company and insurance carrier, any defenses which they may have and wish to urge before [18] Commissioner Pillsbury, and we are not waiving any of those defenses by appearing herein, which is for the convenience of the claimant who is residing in the City of New Orleans, State of Louisiana.

Deputy Commissioner Henderson: Mr. Woodville, it will be in order for you to call your first witness.

Mr. Woodville: Mrs. Louise Johnson, Sr.

Mrs. Louise Johnson, Sr., the claimant, being first duly sworn by the Deputy Commissioner to tell the truth, the whole truth and nothing but the truth, testified as follows, on

Direct Examination

By Deputy Commissioner Henderson:

Q. For the record, will you state your full name?

A. Mrs. Louise Johnson.

Q. Mrs. Louise Johnson, Sr.?

A. Yes, sir.

Q. And where do you live now?

A. 8821 Cohn Street.

Q. That is here in New Orleans?

A. Yes, sir.

Q. How old are you, Mrs. Johnson?

A. 42.

Q. What is the date of your birth?

A. December 28th.

Q. What year? A. 1905.

Q. That would make you 41?

A. This coming December.

Q. So your correct age is 41 as of now, and you will be 42 this coming December?

A. Yes. [19]

Deputy Commissioner Henderson: Proceed, Mr. Woodville.

Q. (By Mr. Woodville): Are you married?

Mr. Normann: We object to that. We think the best evidence of that would be the marriage certificate itself.

Q. (By Deputy Commissioner Henderson): Are you the mother of Robert Johnson, Jr., the dead man in this case? A. Yes.

Q. Who is the mother of Robert Johnson, Jr.?

A. I am.

Mr. Normann: Now, Mr. Commissioner, I want

to state that these questions are subject to my objection without necessity of repetition.

Q. (By Deputy Commissioner Henderson): Who is the father of Robert Johnson, Jr.?

A. Him, Robert Johnson, Sr.

Q. Were you and Robert Johnson, Sr., married?

A. Sure.

Q. I say Senior as distinguished from Robert Johnson, Jr., the dead man. Were you and Robert Johnson, Sr., married? A. Yes.

Q. You remember the date?

A. December 23, 1919.

Q. Where were you married?

A. At the City Hall.

Q. Here in New Orleans? A. Yes, sir.

Q. Have you and your husband lived together ever since? A. Yes.

Q. Has there been a divorce or anything? [20]

A. No, sir.

Q. You and your husband live together?

A. Yes.

Q. Now? A. Yes.

Q. (By Mr. Woodville): When was the boy born?

A. May 22, 1924, or—he is 22 now. He would be 22 May gone.

Q. That would be 1924? A. Yes.

Q. (By Deputy Commissioner Henderson): When was he born? A. May 13.

Q. 1924?

A. May 27th. wasn't it? Look at that record.

Q. You say Robert Jr. was born what date?

A. May 27.

Q. 1924? A. 1924.

Q. (By Mr. Woodville): Was he born of that marriage of you and Robert Johnson, Senior?

A. Yes.

Q. Robert Johnson, Sr., was his father?

A. That's right.

Mr. Woodville: We offer, produce and file in evidence the marriage certificate of Robert Johnson, Sr., and Louise Washington, and the birth certificate of Robert Johnson, Jr. I will get those from the Board of Health.

The Claimant: I have all of that already. [21]

Mr. Woodville: You bring them with you?

The Claimant: No, sir.

Mr. Woodville: I will submit them to you, Mr. Normann.

Deputy Commissioner Henderson: You don't have those now, Mr. Woodville?

Mr. Woodville: No, sir. I thought we were coming today to prove nothing but dependency. I thought those things were already in the record, having come into the case late.

Deputy Commissioner Henderson: Do you have any objection to those being received in evidence, Mr. Normann?

Mr. Normann: No, sir, not if he can produce them, but subject to my objection.

Deputy Commissioner Henderson: When can you have those, Mr. Woodville?

Mr. Woodville: This afternoon. She can go home

and get them. I thought I would have to get them, but she says she has them. I will file those during the course of the day.

Deputy Commissioner Henderson: Attorney for Defendants objects to receiving those certificates in evidence without opportunity to see them and examine them. When they are produced their admissibility will be ruled on at that time, subject to objection of defendants. We will proceed with examination of the witness, Mr. Woodville.

Q. (By Mr. Woodville): Did your boy Robert Johnson, Jr., contribute to your support; anything?

A. Yes, he did.

Q. Did you require the amount he sent you to live on; could you get on without it if he didn't send it to you? [22]

Mr. Normann: That is leading, and I object. She is represented by counsel, so don't tell her.

Mr. Woodville: I put that in legal form.

Mr. Normann: That is objected to, Mr. Woodville. You are testifying instead of asking her a question.

Q. (By Mr. Woodville): How much did your boy send you on an average?

A. When he first went out there, he sent me \$30; then he started sending me \$15 a week and after my girl got pregnant out there, I didn't get any more.

Q. (By Deputy Commissioner Henderson): With reference to contributions by the decedent, we shall consider only one year prior to the decedent's death, coming back or going back one year

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Q. 1924? A. 1924.

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to see what contributions might have been made, would seem a sufficiently long period to determine if there was any real dependency or not, so the period back to December 6, 1944, would be sufficient. Now this witness stated when he first went to California, he sent her \$30. Now when did he go to California? A. I just can't remember.

Q. You remember about when it was?

A. No, sir; I don't remember. I am too upset.

Q. You don't have to go into all that explanation. Just answer yes or no. Don't you know about when it was that he went to California?

A. No, I don't.

Q. (By Mr. Woodville): He was working other places in California before he went to the shipyard? [23]

Q. (By Deputy Commissioner Henderson): Where did he go in California?

A. Washington; Bremerton, Washington.

Q. You don't know when he went to California?

A. No, I don't.

Q. You know when he sent you the \$30?

A. He sent me the money when he was in California.

Q. About what year or month was that?

A. He sent me money then all last year.

Q. About what month of the year did he send you the \$30? A. The \$30?

Q. The \$30 which you said was the first money he sent you? A. In 1944 and in 1945.

Q. That may be true, but that doesn't answer the question. A. I don't know.

Q. Well, you will have to think.

A. I know the last time he sent me two \$10 bills in November to buy me some Venetian blinds.

Q. (By Mr. Woodville): What year?

A. 1945.

Q. In November 1945 he sent you two ten dollar bills—in November? A. Yes.

Q. What was the last time before that, he sent you any money?

A. I just can't remember. You see my daughter * * *

Q. When was the last time before November, before you got these two ten dollar bills in November, how long had it been that you had received anything further from him?

A. I think August or July—one of those months.

Q. Either July or August? A. Yes.

Q. How much did he send you in July or August? A. \$15.

Q. That was in either August or July 1945?

A. Yes.

Q. Now did he send you any money in June?

A. Yes, he sent me in June.

Q. How much money did he send you in June?

A. I think 15 then too.

Q. He sent you \$15 in the month of June?

A. Yes.

Q. Was that all he sent you in the month of June, \$15 for the whole month?

A. I think he sent me money twice in June.

Q. How much did he send each time, \$15 each time?

Deputy Commissioner Henderson: Let her answer that question.

A. Each time.

Q. (By Deputy Commissioner Henderson): You mean to tell us he sent you \$30 in June, 1945?

A. I didn't say.

Q. You told him (Mr. Woodville) that.

A. I said \$15.

Q. (By Mr. Woodville): I just want the truth. Is that all he sent you in June, that \$15? Now think well. Try to remember and if you can't remember, say so.

A. I can't remember, because I am wool-gathered.

Q. All he sent you was \$15 in June?

A. Yes. [25]

Q. (By Deputy Commissioner Henderson): When did he send you money before June?

A. Let me explain this to you. My daughter went up there and got pregnant and he was taking care of her then.

Q. (By Mr. Woodville): We are talking about when your daughter went there. When did she go to California?

A. December, 1944, and she got pregnant and he stopped sending money to me. I told him to take care of her; he was running with her all of the time.

Q. You get any money in May?

A. Yes. The baby was born in October.

Q. How much did you get in May, 1945?

A. I just can't remember.

Q. Did you get those payments by Western Union?

A. Yes, and I went down there to get a record of it and they told me to get the date.

Q. (By Deputy Commissioner Henderson): You don't know how much, if any, he sent you in May, 1945? A. No, I don't know.

Q. (By Mr. Woodville): Did you get anything from him in April, 1945?

A. I think I did. That was Easter. He sent me money to get clothes for the children.

Q. (By Deputy Commissioner Henderson): How much. A. That was \$30.

Q. That was April, 1945? A. Yes.

Q. (By Mr. Woodville): Now between the first of January, 1945, and this \$30, [26] he sent you for Easter, did he send you any money in between that time, from January to Easter?

A. Yes. First part of the month regular I got it then, but after my daughter got pregnant, he had to pay for her.

Q. Now in March, how much did he send you—do you remember, March, 1945? Do you know how much he sent you. We have gotten now from November to Easter, 1945. Now before Easter, 1945, what was the time before that, that you received any money from him? How many weeks or months or days was it before you received that \$30? How long before you had gotten anything from him?

A. I used to get \$15 from him right along, twice a month; sometimes three times.

Q. You mean those previous months?

A. You said in——

Q. I made the question very plain. You said you got \$30. A. For Easter.

Q. Now when was the last time before you got that \$30 that you got any money from him; how long before that?

A. I got money in March, to; I think \$15; and in March I got some money too.

Q. (By Deputy Commissioner Henderson): How much did you get then?

A. I was getting \$15.

Q. (By Mr. Woodville): For the whole month?

A. I got it twice.

Q. (By Deputy Commissioner Henderson): You mean you got \$30 in March, 1945?

A. Yes.

Q. Is that what you mean? I remind you that you are under oath to tell the truth; so think carefully.

A. Two \$15 money orders. If I could get that record from [27] the Western Union——

Q. I know, but you don't have it. You mean to tell us now you got \$15 on two different times in March, from the deceased? A. Yes.

Q. (By Mr. Woodville): In February, the month before that, how much did you receive—that is two months before the Easter month. You remember how much you received in February, 1945? Was he sending you money regularly at that time? A. No, not regular.

Q. At that time he was not sending you money regular? A. No.

Q. (By Deputy Commissioner Henderson): Do you think you got any money in February, 1945, from the deceased, or do you think you did not get any that month? A. I don't remember.

Q. You don't know if you did or did not?

A. No.

Q. How about January, 1945, that is the first month of that year. You recall if you got any money from the deceased in January, 1945?

A. No.

Q. So you don't know if you got any money from the deceased in January, 1945, or not? Is that right? A. That is right.

Q. (By Mr. Woodville): Now in December, 1944, how much money did you get from him? That was Christmas time.

A. I don't know. That has been a long time. I can't remember that.

Q. You have to try to remember something. You have no records so you will have to use your memory as best you can as to [28] what you received from him.

A. (The witness fails to answer.)

Q. (By Deputy Commissioner Henderson): You don't know if he sent you any money in December, 1944, or not?

A. I am not to myself right now.

Q. Then you don't know right now if he sent you any money in December, 1944, or not?

A. That's right. You see, with a sudden death like that, it gets me all upset.

Q. (By Mr. Woodville): What did you do with this money he sent you?

A. I took care of my children with it.

Q. How many children have you?

Mr. Normann: We object, for there is no claim here for any children.

Mr. Woodville: If it please the court, the number of children she had in her family would affect the capacity of what money her husband gave toward her support, and the same people she would have to support herself, would add to the amount of her dependence on the decedent.

Q. (By Deputy Commissioner Henderson): How many children did you have then?

A. Six.

Q. Were those six children you spoke of—was that money from the decedent spent on them?

A. Yes.

Q. You use the money to support these children?

A. Yes.

Q. In what way did you use it? What did you spend it for?

A. Buy clothes and food and send them to school. I [29] graduated one girl on the money he sent me.

Q. You use all of the money you told us about that the deceased sent you, for that purpose?

A. Yes.

Q. Is that right?

A. Yes.

Cross-Examination

By Mr. Normann:

Q. Now, Louise, you have a daughter by the name of Louise in California? A. Yes.

Q. That is your oldest daughter, is that right?

A. Yes.

Q. That is the daughter who became pregnant?

A. Yes.

Q. When did that daughter become pregnant?

A. I don't know when she got pregnant, but I know the baby was born October 19th.

Q. What year? A. 1945.

Q. Now you don't know what day she became pregnant? A. No.

Q. You testified in answer to Mr. Woodville, that she became pregnant on December 3, 1944?

A. No. I told him she left for California December 3.

Q. You didn't say she became pregnant on December 3, 1944?

A. No, I said she went to Los Angeles on December 3.

Q. I believe you also told Mr. Woodville that from the time your daughter became pregnant, until the time the baby was born, you did not receive any money from your son. Is that correct?

A. Yes.

Q. During that time, what was he doing with his money; you know?

A. Taking care of our daughter.

Q. Is she married? A. No, sir.

Q. Her child was not a legal child?

A. No, sir.

Q. Your son and your daughter were living together at the time he was killed?

A. Yes, sir.

Q. (By Deputy Commissioner Henderson): When was this baby born? A. October 19.

Q. What year. A. 1945.

Q. (By Mr. Normann): You know whether or not your daughter went to work after her baby was born? A. No.

Q. She did not? A. No, sir.

Q. Is it not a fact that your son supported your daughter after the baby was born?

A. He supported her before when she was pregnant.

Q. After the baby was born, October 19, 1945, he continued to support your daughter and her little baby? A. Yes.

Q. Is that right? A. Yes.

Q. (By Deputy Commissioner Henderson): What is your daughter's name? [31]

A. Louise Evelyn Johnson.

Q. (By Mr. Normann): How long did that little baby stay with your daughter?

A. He stayed with her a month and two weeks, when I brought the baby back.

Q. After your son was killed? A. Yes.

Q. Up until the time that you brought the baby back, your son was supporting your daughter and the baby. Is that correct? A. Yes.

Q. And also all during the time that your daugh-

ter was pregnant, your son supported your daughter?

A. No, not all of the time. This fellow she was living with, left her after she was four or five months' pregnant; that's when he left her.

Q. Now you testified both to Mr. Woodville, and you testified in answer to my question, that during the time that your daughter was pregnant, your son had taken care of her?

A. Not the whole while. She had a common law husband and he left her, because how I know as much as I do, because some girls come back from there and told me how dirty he did.

Q. How long had your daughter been living with this common law husband?

A. Since she went up there.

Q. (By Deputy Commissioner Henderson):
December 3, 1944? A. Yes.

Q. Your daughter go from here to California?

A. Yes.

Q. And she got to California December 3, 1944?

A. She left on the third.

Q. Left New Orleans on December 3, 1944, and went to Los [32] Angeles? A. Yes.

Q. (By Mr. Normann): You know when she took up to live with this common law husband?

A. No.

Q. Was the common law husband living in the same house with your son and daughter?

A. They had a room to themselves at first.

Q. In the same house?

A. It is a hotel; but after he left, she moved with him.

Q. And the common law husband left your daughter about five months before the baby was born? A. Yes.

Q. Now from the time Louise, that your daughter's common law husband left her, up until the time your son was killed, he was taking care of your daughter and her baby? A. Yes.

Q. Your daughter had no other means of support? A. Yes.

Q. That right? A. Yes.

Q. Now during that period of time, your son did not send you any money at all; is that right?

A. Yes.

Q. Is that what you mean to tell the court?

A. That's right.

Q. And you brought the baby back?

A. Yes.

Q. After the funeral service out there?

A. Yes, sir.

Q. Now, Louise, is it not a fact—now listen well to what I [33] am asking you. We just want to know the truth. Is it not a fact that from the time that your daughter arrived in California, which was in the early part of December, 1944, that your son supported your daughter all during that time?

A. No.

Q. That is not a fact? A. No.

Q. You mean by that, then, that he did not pay for the groceries during that time; did not pay the rent and did not pay her expenses? Is that what

you are telling the Court? Now think well, Louise; I am going to put you on your guard and show you a statement and ask you to think well if that is not the truth, that all during that time your son supported your daughter by buying her groceries, paying her rent and all her expenses? Isn't that true?

A. Well, I will have to explain that to you.

Deputy Commissioner Henderson: You can say if that is true or not true, and then give an explanation.

Q. (By Mr. Woodville): Do you know; were you there?

A. No, I was not there. She left here to go to him.

Q. (By Deputy Commissioner Henderson): To your son? A. Yes.

Q. (By Mr. Normann): And she lived with the dead boy? A. Yes.

Q. (By Deputy Commissioner Henderson): You mean she lived with your son, who is the dead boy in this case, up to where she took up with this common law husband?

A. Yes, but I don't know when she took up with him, and I didn't know she was pregnant until the boy left her. When I got the news the boy had left, and he told me he would have to take care [34] of her, because the fellow went to Frisco.

Q. And while this common law husband of your daughter lived with her, he supported your daughter? A. Yes.

Q. While he was with her? A. Yes.

Q. As her common law husband and living with her?
A. Yes.

Q. But when he left her, the dead boy had to support her or did support her?
A. Yes.

Q. Is that what you mean?
A. Yes.

Q. And the dead boy, the decedent in this case, if I understand you correctly, did continue to support your daughter while she was still pregnant, until the baby was born?
A. Yes.

Q. And which was on October 19, 1945, as you said?
A. Yes.

Q. Now during the time that the dead boy supported your daughter, after her common law husband left her, the dead boy did not send you any money because he was using it for his own support and the support of your daughter?

A. That's right; that's right.

Mr. Normann: And she also said up until after the baby was born, up until his death, he was supporting her daughter and baby.

The Witness: Yes.

Q. (By Deputy Commissioner Henderson): The baby was born to your daughter October 19th, 1945, and your son was killed December 6, 1945?

A. Yes. [35]

Q. From October 19, 1945, when the baby was born, to the day the dead boy was killed, he supported the daughter and baby?
A. Yes.

Q. And during that time, namely, October 19, 1945, to the time of his death, the dead boy did not send you any money during that time because he

was using his money for his own support and to support your daughter and her baby?

A. That's right.

Q. (By Mr. Normann): Now, Louise, when your daughter left New Orleans on December 3, 1944, where did she go? A. To my son.

Q. Where was your son? A. Los Angeles.

Q. And she lived with him at Los Angeles?

A. Yes.

Q. She continued to live with your son until she took up with this common law husband? Is that what you are telling the Commissioner?

A. Yes.

Q. Now, Louise, during that—how long did she live with your son from the time she arrived in Los Angeles until she took up with her common law husband? A. I don't know.

Q. Well, now, you received letters from your daughter and son, did you not? A. Yes.

Q. Is it not a fact and don't you know that your daughter lived with and was supported by your son during the first three months after she got out in California? A. Until she got a job.

Q. Now, when did she get a job? [36]

A. I don't know. It was in December when she went to work out there, or January. I think she went to work in some rubber factory out there?

Q. What year? A. 1944.

Q. (By Deputy Commissioner Henderson): What year? A. 1944.

Q. Same year she went out there? A. Yes.

Q. (By Mr. Normann): What was the name of the place she worked?

A. I don't know. Some rubber factory.

Q. How long did she work?

A. I don't know.

Q. They never told you how long?

A. No, sir; no, sir.

Q. You don't know whether she worked one day, one week or one month?

A. No, sir.

Q. Is it not a fact your daughter became pregnant right after she got out to California?

A. From the date the baby was born shows as proof there.

Q. And from the time that she became pregnant until the time the little baby was born, your son supported your daughter during that time; is that correct?

A. I can't say he supported her all of the time. She stayed with the common law husband after she became pregnant a while.

Q. Is it not a fact, Louise, that the common law husband left your daughter in January, 1945?

A. I don't know when he left her. No, he didn't leave her in January. [37]

Q. How do you know he didn't leave her in January?

A. I know it was not in January when I knowed she was pregnant.

Q. You didn't know she was pregnant in January?

A. I knowed it when he had left her. The boy wrote me and told me about it.

Q. (By Deputy Commissioner Henderson):
What boy wrote you? A. My son.

Q. The dead boy in this case? A. Yes.

Q. (By Mr. Normann): When was that, in the
early part of the year?

A. Yes, I think it was.

Q. Try to think; was it not in January or February
of last year? A. I can't remember.

Q. Was it not in the real early part of the year,
Louise? A. I don't know.

Q. Louise, let me ask you this: I am trying to
help you remember, but you remember when Christ-
mastime is? A. Sure.

Q. Was it not shortly after Christmas that you
got the letter from your son that your daughter was
beaten by her common law husband and had left
her, and she was pregnant?

A. I can't remember.

Q. Well, let me help you this way. Was it not
before the first of the year you got that letter?

A. No.

Q. You were disturbed by that letter, weren't
you? It upset you considerably, didn't it?

A. That's right. [38]

Q. Now is it not a fact that you wrote your son
that your holidays were spoiled because of that
bad news?

A. No, that was not at Christmas time.

Q. I didn't say it was Christmas time. Was it
not right after the first of the year? That is what
I am trying to get at. Was it not right after the

first of the year? Was it not before the carnival season? A. I just can't remember.

Q. Your children are promoted in school in February, aren't they? A. Yes.

Q. Now does that help remember the date? Was it in the part of the year, before the children were promoted last year, that you got that letter? I am just trying to help you to remember.

A. I know it was in the wintertime.

Q. Now that is what I am trying to find out. Louise, was it not in the early part of the wintertime?

Deputy Commissioner Henderson: Before Christmas?

Mr. Normann: No, winter starts December 31st. That is what you mean, is it not Louise?

Deputy Commissioner Henderson: I doubt she knows when the winter starts from the calendar.

The Witness: Yes, I do. I went to school, but when a sudden death comes to you like that, and everybody said I stood it up well, and I brought the baby back. I went to the 8th grade. I know the year and months and everything else.

Q. (By Mr. Normann): Now, Louise, we are not trying to trap you; just get something definite out of you that this case can be decided on. Now you say it was in the wintertime. That is what we are trying to find out. Was it shortly before or shortly after Christmas? Let me put it that way to you. [39]

A. It was not in the Christmas time. It was not in December.

Q. All right; let's forget about December. The next month is January; first month of the year.

A. I know it was cold, because I bought her three flannelette nightgowns and sent them to her.

Q. Was that shortly after January 1 of 1945?

A. I don't know anything when it happened; but it was cold.

Q. (By Deputy Commissioner Henderson): Was that after you heard she was pregnant that you got the flannelette nightgowns or before you heard she was pregnant? A. That was before.

Q. Before you heard she was pregnant?

A. Yes.

Q. And you stated it was in January when you first heard about it?

A. I didn't say January.

Q. Well, when? February?

A. I don't know what month it was, but when the boy wrote me and told me the boy beat her up and left her, I don't know what month that is.

Q. The common law husband had already left her when the dead boy wrote you that?

A. Yes.

Q. If the baby was a nine month baby, the baby had to be conceived in January.

A. Well, that's right. That's why he asked me that. It must have happened in January to be born in October.

Q. (By Mr. Normann): But it was when you got this letter from your son that this common law husband had beat her and his notifying you that your daughter was pregnant, that is when you sent the three nightgowns; is that right, Louise? [40]

A. Yes. Listen, I'm getting tired of you cross-talking.

Q. Just answer the questions.

A. I can't answer all that if you keep crossing and crossing me all of the time.

Q. (By Deputy Commissioner Henderson): You have not answered definitely, and that is the reason. His question was, didn't you get that letter from your dead boy that your daughter's common law husband had treated her badly and gotten her pregnant, had you not gotten that letter before you sent the nightgowns? A. Yes.

Q. Because it would seem reasonable that you sent the nightgowns because you knew your daughter would need them when she was pregnant?

A. Yes.

Q. Louise, you know about when it was you sent the nightgowns?

A. No, sir; I really don't know.

Q. (By Mr. Normann): But it was cold?

A. Yes, when I sent them.

Q. (By Deputy Commissioner Henderson): Cold here? A. Yes.

Q. And you stated it was not in December, so it was the first part of 1945? A. Yes, sir.

Q. So the closest you can get to it would be the first part of 1945; might have been January or February or March—the early part of 1945?

A. That's right.

Q. (By Mr. Normann): And that was after you learned your daughter was pregnant; [41] after

getting this letter that your daughter's common law husband beat her?

A. I told that over and over.

Deputy Commissioner Henderson: She said after her daughter's common law husband beat her and left her, that her son wrote and told her about it, and then she sent her daughter three nightgowns.

Q. From that time on your son supported your daughter until the baby was born, so I don't have to repeat it. That is correct, isn't it?

A. Yes, that is correct.

Q. (By Deputy Commissioner Henderson): Your son, the dead boy, didn't send you any money you said, from the time he started taking care of your daughter until his death. Now from the time your daughter got to California, until she took up with this common law husband, your dead boy did support your daughter from the time she got in California, until she took up with this common law husband? A. That's right.

Q. The dead boy supported her? A. Yes.

Q. And from the time she took up with the common law husband until he left her, the common law husband supported her? A. Yes.

Q. You don't know how long that was?

A. No.

Q. But whatever time it was—one month, two months, three months, four months, or five months, during the time the common law husband was supporting your daughter, for I understand from your

testimony, your deceased son sent you money during that time? A. Yes. [42]

Q. And after the common law husband left your daughter, the dead boy had to go back to supporting your daughter? A. Right.

Q. And from that time on, didn't send you any money? A. No, sir.

Q. Now one question more. I want to ask you, now listen carefully so I can understand you. Please listen carefully. The dead boy, the decedent in this case, didn't send you any money after your daughter's common law husband left her? A. No.

Q. The dead boy didn't send you any more money then from the time the common law husband left your daughter, until the dead boy was killed?

A. In November he sent me two ten dollar bills to get some Venetian blinds.

Q. That was all of the money then he sent you from the time the common law husband left your daughter until the dead boy's death, was the \$20?

A. Yes.

Q. And you don't know when the common law husband left your daughter? A. No.

Q. But I believe you remember stating a few minutes ago something about your daughter had been pregnant four or five months when the common law husband left her? A. I do.

Q. Because Captain Normann followed that with the question to the effect he had been gone about five months.

A. I heard that about two Sundays ago. Someone came from Los Angeles and told me about it.

Mr. Normann: Then we object to that as hearsay; as information not within her personal knowledge, and her testimony [43] indicated she was talking of her personal knowledge, and therefore must be stricken from the record.

Q. (By Deputy Commissioner Henderson): Mrs. Johnson, you stated the decedent, your son, sent you \$30 in March—\$15 two times in March, 1945. If that is true, then your daughter's common law husband was living with her then. Are you following me? A. In March?

Q. Listen carefully. You stated a moment ago in March, 1945, the decedent,—the dead boy, sent you \$15 two different times in March, 1945. Now if that is true, then your daughter's common law husband was living with her then, because you have already stated when the common law husband was with your daughter, he supported her; so I take it from what you stated, that the common law husband was still living with your daughter in March, 1945. Then you stated in April, 1945, the dead boy sent you \$30? A. Yes.

Q. So if that is true, Mrs. Johnson, the common law husband was with your daughter in April, 1945, and in May you said you don't know if the dead boy sent you any money or not, so in June you stated the dead boy sent you \$15, and July or August he sent you \$15, and November, \$20. So that would seem to indicate that your daughter's common law husband probably lived with her and left her about May, 1945.

A. I don't know. I know he left her.

Q. (Continuing): Because if your statement is true that while the common law husband was with your daughter, the dead boy sent you money, and when the common law husband was not with your daughter, the dead boy did not send you any money; so it would indicate the common law husband left your daughter in about May, because you can't remember if your son sent you any money in May or not, and it would indicate the common law husband may or may not [44] have been with your daughter in June or July, because your son sent you money; because you earlier said your son did not send you any money after your daughter's common law husband left her. So if that is true, do you still say the dead boy sent you \$15 in June, 1945, and \$15 in July or August, 1945?

A. I don't know.

Q. That is what you told us. But do you still say that is correct? Is that correct to the best of your knowledge?

A. That is the best of my knowledge. I am wool-gathered now. I know he sent me money.

Q. We are talking about June, July and August. Do you think that is right, that he sent you \$15 in June, which might mean the common law husband was living with your daughter, and he sent you \$15 in July or August, and that might indicate the common law husband was still living with your daughter. Now do you say yet, after thinking it over, that you think or say that the dead boy sent you \$15 in June, 1945, and \$15 in July or August, 1945, or now do you think that might be wrong?

A. I can't say.

Q. (By Mr. Normann): Now what——

Q. (By Deputy Commissioner Henderson):
What do you think is right?

A. I think it is right.

Q. (By Mr. Normann): Now what was last
year? A. 1945.

Q. Are you not talking about the year 1944 when
you say this money was received from your son; are
you not talking about the year before last—1944?

A. He sent me money in 1944, too.

Q. He only sent you money in the early part of
1945? [45] A. Huh?

Q. You said he sent you money in 1944?

A. Yes.

Q. He went to the West Coast early part of
1944? A. Yes.

Q. And he sent you money during 1944?

A. Yes.

Q. When you told the Commissioner he sent you
money in June and July and August, you are not
(sic) referring to the year 1944 and not the year
1945, because a few moments ago you testified while
your daughter was pregnant and her common law
husband left her, your son was not sending you
money, but supported your daughter? Answer yes
or no.

A. I don't know.

Deputy Commissioner Henderson: I was won-
dering if she didn't maybe mean 1944 instead of
1945.

Q. (By Deputy Commissioner Henderson): Louise, think carefully and see if these times that the dead boy sent you money, in January, you said you don't know; February, 1945, you don't know; but in March, 1945, \$30; April, 1945, \$30; June, 1945, \$15; July or August, 1945, \$15. Now March, April, May, June, January and February—was that 1944 or 1945 that he sent you that money?

A.. Now look, he sent me money in 1944 and 1945, too.

Q. That may be true. We are not denying that.

A. You see, I am telling you what I can remember. He sent me money in 1944 and left Washington and sent me money from California in 1945.

Q. I am just wondering if you got the two years confused in your mind and maybe you see what I mean.

A. Could I say one more word?

Q. Sure. [46]

A. You know that was my child who lost his life. You know how I feel about it? If I have to go through all this, I would rather for the company to keep this money. I am poor, it's true. I would rather for the company to keep the money.

Deputy Commissioner Henderson: Rest a moment.

A. (Continuing): He lost his life. Why don't they pay me without going through all this red tape? They can keep it. I am tired of answering all these crosses, crosses. The insurance company paid me off. I didn't have no trouble with the insurance company. They paid me off right now.

Redirect Examination

By Mr. Woodville:

Q. Mrs. Johnson, listen to me. I am not trying to twist you up. You say you received a letter from your son telling you about how your daughter's common law husband had treated her and gone off and left her pregnant. Was that about the time, just before or just after you received that money in August, before he died?

A. Before he died.

Q. You said you received money in August, before he died. You said \$15? A. Yes.

Q. Now the August before he died—now that letter that you got from your son—

A. (Interrupting): That was in the winter time, because I sent her the gowns.

Q. Well, you said the common law husband lived with your daughter a while? A. Yes.

Q. She must have become pregnant on or about the 19th day of January, 1945?

A. That's right. [47]

Q. Now your daughter never did write and tell you she was pregnant? A. No, sir.

Q. So you didn't know it until your son wrote and told you? A. Yes.

Q. And your son had to find it out in some way. Mr. Normann: You are telling her.

Deputy Commissioner Henderson: Probably by observation.

Q. (By Mr. Woodville): And now you have testified that he sent you that money for Easter in the month of April. You testified to that?

A. Yes.

Q. Was it before or after that, that you got that letter about your daughter? Now, if you can't remember, tell me, and if you can, say so.

A. I can't remember.

Q. You don't remember whether it was before or after that? A. No.

Q. Now when you testified that your son didn't send you any money after your daughter's common law husband left her, because he had to take care of her, you mean he didn't send you any money at all or ceased sending regularly as he did before your daughter went out there?

A. Not regular.

Q. He didn't send it regularly after your daughter went out there?

A. Because she was pregnant.

Q. In 1944?

A. I can't go back that far.

Q. Before your daughter went out there, your son send you money regularly? A. Yes. [48]

Q. Regular? A. Yes, right every week.

Q. (By Deputy Commissioner Henderson): Every week? A. Yes.

Q. (By Mr. Woodville): Every week?

A. Yes.

Q. You meant he didn't send you money regular after that?

A. After the boy left the girl.

Q. But he did send you this money that you testified about? A. Yes.

Recross-Examination

By Mr. Normann:

Q. How many of them came by Western Union?

A. So many I went there twice and they told me I would have to have the dates.

Q. You couldn't furnish them?

A. No. I saw the chief and he told me I would have to have the dates.

Mr. Normann: That's all.

Mr. Woodville: That's all.

Deputy Commissioner Henderson: No further questions?

Mr. Woodville: No, sir.

Q. (By Deputy Commissioner Henderson): Mrs. Johnson, was your husband working during the time that the dead boy was sending you money?

A. Yes, sir.

Q. Can you give us any idea how much he was making?

A. My husband?

Q. Yes. A. My husband makes? [49]

Q. At that time, meaning when the dead boy was sending you money, can you give us any idea what your husband was making?

A. \$28 I think.

Q. \$28 a week?

A. Yes, and after that he just got promoted to a tractor and he makes \$36, and they take out. He works at the Naval Supply Depot.

Q. How many was in your family that had to be supported at that time?

A. The same six.

Q. Six children? A. Yes.

Q. And yourself and your husband?

A. Yes. I have a girl who graduated from high school and went to the "Y" and took up shorthand and typing.

Q. At that time you had six children, yourself and your husband? A. Yes.

Q. So there were eight in your family?

A. Yes.

Q. Any of the children working at that time?

A. No.

Q. Were you renting the house you lived in or own it? A. Rent.

Q. How much rent did you pay at that time?

A. \$12.

Q. \$12 a month? A. Yes.

Q. And your husband was making \$28 to \$36 a week? A. Yes.

Q. And out of his income the whole family had to be supported? A. That's right.

Q. Food, clothes, house rent?

A. Insurance, societies. [50]

Q. All of the family expenses had to be met out of your husband's income? A. Yes, sir.

Q. Was your husband's income sufficient to meet your living expenses at that time?

A. No; I couldn't get along with what he was making.

Q. Why? A. Just was not enough.

Q. Why, just wasn't enough?

A. You know you can't get things cheap no more.

Q. What was done about it?

A. That was the cause of the child going to Washington, to make more money and help support the family. He worked and helped take care of the family.

Q. Was it under that same circumstance that he sent you the money? A. Yes.

Q. In other words, if I understand you correctly, he went to Washington to get a job to to help support the family? A. Yes. Right.

Q. Because as you say, the income from your husband was not sufficient to pay expenses of the house and support your family? A. Yes.

Q. So your son went to Washington State—Bremerton, to get a job and help support the family? A. Yes; first he went to Texas.

Q. The money he sent you after he went to Washington State, was to help support you and your children and his father? A. Right.

Q. Which was the family home?

A. That's right.

Q. Because the father's income was not enough, he went out there [51] to help the family?

A. Correct.

Q. Is that what you mean? A. Yes.

Q. And he kept up—that means trying to do his part by the money he sent you that you have told us about? A. Yes, sir.

Q. Is that what you mean? A. Yes.

Q. Then according to the family budget—that means money you have—your husband's income and the out-go, if I understand you, you needed the money the dead boy sent you? A. Yes.

Q. Did you get any benefit out of that money the dead boy sent you? A. Yes, sir.

Q. How did it help you?

A. How did it help me?

Q. Yes, because a few minutes ago you said you bought clothes and things for the children. How did that benefit you, yourself?

A. Well, I done without to take care of my children.

Q. Did you buy clothes out of that for yourself?

A. Sure, sure. Shoes and things like that.

Q. What other ways, if any, did that money he sent you benefit you, yourself?

A. How did it benefit me? Well, I bought dresses and underwear and things like that.

Q. For yourself?

A. Yes, because with what my husband makes, I can't buy clothes for myself, could I?

Q. You also said you bought groceries?

A. Yes. [52]

Q. With some of the money he sent you?

A. Sure.

Q. If you would just follow me carefully, it would be easier for you to answer questions. Then you got the benefit out of the groceries that you bought out of the money, and your children got benefit out of the groceries bought out of that money? A. Everybody got benefit.

Q. You filed the claim and I want to know how you, yourself, benefited out of the money that the dead boy sent home. So you got clothes for yourself and bought groceries used for the whole fam-

ily, and you got your part of the groceries like they got theirs. Is that what you mean? A. Yes.

Q. So you were relying on money he sent home to help meet the family expenses? A. Yes.

Q. Were you looking forward to receiving the money from the dead boy? A. Yes.

Q. You really needed that money?

A. Yes.

Q. Did you rely on that money the dead boy sent to help meet your expenses? A. Yes.

Q. You rely on him sending that money?

A. Yes.

Q. You depended on the dead boy sending you money? A. Yes, I depended.

Q. Was that the only outside source of help that you had other than your husband?

A. That is all.

Q. None of the other children were working?

A. No.

Q. They were an expense rather than help?

A. Yes.

Redirect Examination

By Mr. Woodville:

Q. You needed the money the boy sent you?

A. Yes.

Recross-Examination

By Mr. Normann:

Q. Now as a fact, Louise, you have one child named Edward Johnson, haven't you?

A. Yes, sir.

Q. Edward is 15 years of age? A. Yes.

Q. What is the name of the oldest girl?

A. Lucille Idelle.

Q. One of the daughters had a job and paid for her own clothes and school course?

A. Paid for her own school? She had no job.

Q. Your daughter didn't have a job?

A. That oldest one used to work.

Q. Is that the one that paid for her clothes and schooling?

A. I paid for her schooling. Which one are you talking about?

Q. The oldest one? A. In Los Angeles.

Q. You said she went to work after she got to California? A. Yes.

Q. You didn't support her?

A. No. After she got pregnant the boy took care of her.

Q. She go to school here? A. Yes.

Q. Who paid for that schooling? [54]

A. We did.

Q. She didn't work while she was here?

A. Oh, yes.

Q. Who did she work for?

A. In a private home.

Q. You mean she worked as a servant?

A. Yes, and another place washing the cars and trains—Public Belt I think.

Q. She worked every day in the week?

A. Yes.

Q. How much did she make?

A. I don't know because she was not at home with me.

Q. She lived in New Orleans but not with you?

A. Yes.

Q. That is the one that became pregnant?

A. Yes.

Q. During that time, you were not supporting her? A. No.

Q. None of the other children worked, is that true? A. No.

Q. How much insurance did you pay a week, Louise, at that time?

A. Well, I will have to figure all that out.

Q. You figure that out. Here is a pencil and paper. You figure that out.

(The witness listed companies and amounts on paper.)

Q. (Continued): You paid National, \$1.70?

A. Every two weeks.

Q. And every two weeks you paid Unity——

A. \$1.66.

Q. \$1.66, and you paid 94c to who?

A. To the Keystone.

Q. And who did you pay this \$2.48 to? [55]

A. Standard and Acme 63c a week.

Q. Now the National you pay 85c a week. \$1.70 every two weeks? A. Yes.

Q. You paid Unity—— A. \$1.66.

Q. Every two weeks? A. Yes.

Q. Which is 83c a week? A. Yes.

Q. And Keystone, you paid them 94c a week?

A. Yes.

Q. And this \$2.48?

A. That is Standard, and Acme.

Q. This \$2.48 is every week or two weeks?

A. \$1.24 every week.

Q. And Acme? A. 63c a week.

Q. In addition thereto, you paid \$12 for your rent. Is that correct? A. Yes.

Q. Now you don't have any credit accounts in any stores downtown? A. Yes.

Q. You did? What stores do you have credit accounts in? A. Diboll.

Q. How much credit did you have with them, or how much would you pay for that every week?

A. \$4 every two weeks.

Q. On your furniture?

A. Yes, and sometimes I put things in the "will call."

Q. In the lay-away? A. Yes.

Q. You would buy some things and pay down so much, and pay so [56] much, and pay so much every week until you paid it off in full? A. Yes.

Q. You were always able to meet your bills every week? A. Yes.

Q. You have never been sued? A. No.

Q. You have a good name for credit references?

A. Yes.

Q. Your husband has always worked steadily?

A. Yes.

Q. And he gives you all his money every week?

A. Yes.

Q. You work out any? A. No.

Q. Your husband do any extra work during that time? A. No.

Q. In other words, with the money you received,

you were able to maintain and support your family and meet all your family needs?

A. Correct.

Q. You have been doing that since your son has been dead? A. That's right.

Q. In other words, you are living just the same since your son was killed?

A. No indeed; I can't.

Q. You are paying all your bills?

A. I done paid them out.

Q. You don't have all those bills any more?

A. Don't food cost more?

Q. You are able to pay your bills from week to week now, as you were before your son died?

A. No.

Q. You owe any bills now? [57] A. No.

Q. You have all your bills paid?

A. I need things now.

Q. I said since your son died, you have been able to pay your bills and grocery bills?

A. I have no grocery bills. I pay cash but I am on a lien.

Q. (By Deputy Commissioner Henderson): Your money don't go as far as it used to?

A. Now you are talking. Bread is 12c a loaf now and rice is 25c a pound.

Redirect Examination

By Mr. Woodville:

Q. Now you have to deny yourself things you used to get when your son was living? A. Yes.

Mr. Woodville: I offer in evidence from the Board of Health of the Parish of Orleans, more

particularly from the Recorder of Births, Marriages and Deaths, evidence of the marriage of Robert Johnson and Mildred Washington (colored), according to which certificate the said marriage was registered with the Recorder of Births, Marriages and Deaths on the 23rd day of December, 1919.

Mr. Normann: To which we object on the grounds the marriage certificate on its face shows it was not a legal marriage between the witness here, as she has identified herself in these proceedings and her husband, who is also present here. This shows it was a marriage between Mildred and not Louise at all.

Q. (By Mr. Woodville): Louise, Mildred is your middle name? [58] A. Yes.

Q. (By Deputy Commissioner Henderson): What was your maiden name?

A. Louise Mildred Washington.

Q. This copy of marriage certificate which your attorney has offered in evidence shows the marriage of Robert Johnson to Mildred Washington. That was your middle name? A. Yes.

Q. Louise Mildred Washington was your full name? A. Yes.

Q. So this Mildred Washington stated in this certificate is you? A. Yes.

Q. Is that right? A. Yes.

Deputy Commissioner Henderson. The Deputy Commissioner will receive it in evidence over the objection of Counsel for Defendants. The Deputy Commissioner of District 13 will use it for whatever value he thinks it has. The court reporter is

authorized to identify the same as Claimant's Exhibit No. 1.

(Thereupon there was offered and received in evidence certificate from the Recorder of Births, Marriages and Deaths for the Parish of Orleans, State of Louisiana, showing the marriage of Robert Johnson and Mildred Washington, on the 21st day of December, 1919, by Rev. P. Landry, and will be found at the conclusion of this transcript, marked for identification, Claimant's Exhibit No. 1.)

Mr. Woodville: I offer in evidence certificate from the Recorder of Births, Marriages and Deaths of the Board of Health of the Parish of Orleans, recordation in that office of the birth on the 27th day of May, 1924, of Robert Johnson, Jr. (colored), lawful issue of [59] Louise Washington and Robert Johnson, Sr.

Deputy Commissioner Henderson: Any objection?

Mr. Normann: Subject to the same objection. I suppose you will make the same ruling.

Q. (By Deputy Commissioner Henderson): Mrs. Johnson, in this copy of birth certificate of Robert Johnson, Jr., it is stated he was the lawful issue of Robert Johnson, Sr., and Louise Washington. Louise Washington was your middle name?

A. Yes.

Q. Your full name was Louise Mildred Washington? A. Yes.

Q. So the Washington — Louise Washington stated in this birth certificate, is you?

A. That's right.

Deputy Commissioner Henderson: The same is received into evidence over the objection of Counsel for Defendant for whatever use the Deputy Commissioner of the 13th Compensation District may use it for or consider it, and the court reporter is authorized to identify the same as Claimant's Exhibit No. 2.

(Thereupon there was offered and received in evidence certificate of the birth of Robert Johnson, Jr., on the 27th day of May, 1924, as recorded on the 16th day of June, 1924, and will be found at the conclusion of this transcript marked for identification, Claimant's Exhibit No. 2.)

Mr. Woodville: I offer in evidence photostatic copy of the funeral expense bill of W. D. Fisher & Son, Inc., covering the expenses for their participation in the funeral and burial of the deceased, Robert Johnson, Jr. [60]

Deputy Commissioner Henderson: Any objection, Mr. Normann?

Mr. Normann: No.

Deputy Commissioner Henderson: Same is received in evidence, and the court reporter is authorized to identify the same as Claimant's Exhibit No. 3.

(Thereupon there was offered and received in evidence, photostatic copy of statement of

W. D. Fisher & Son, 4700 Avalon Blvd., Los Angeles, California, in the amount of \$511.75 for the preparation of the body of Robert Johnson, Jr., which will be found at the conclusion of this transcript marked for identification Claimant's Exhibit No. 3.)

Mr. Woodville: I offer in evidence itemized bill of Dennis Mortuary Service, showing the amount due them and paid by the claimant herein, for service rendered by them in the funeral and burial of the deceased, in the amount of \$192.88.

Deputy Commissioner Henderson: Any objection, Mr. Normann?

Mr. Normann: No, sir.

Deputy Commissioner Henderson: Same is received in evidence and the court reporter is authorized to identify the same as Claimant's Exhibit No. 4.

(Thereupon there was offered and received in evidence, Statement of Dennis Mortuary Service, 1940 Eagle Street, New Orleans, La., in the amount of \$192.88 marked "Paid," and which will be found at the conclusion of transcript, marked Claimant's Exhibit No. 4.)

Deputy Commissioner Henderson: Gentlemen, have you any further questions of the witness? [61]

Mr. Normann: No, sir.

Mr. Woodville: No, sir.

Deputy Commissioner Henderson: The witness is excused. Mr. Woodville, do you have any further witnesses?

Mr. Woodville: No, sir.

Deputy Commissioner Henderson: You rest your case?

Mr. Woodville: Yes, I rest.

Deputy Commissioner Henderson: You have any witnesses, Mr. Normann?

Mr. Normann: No, sir.

Deputy Commissioner Henderson: You rest your case?

Mr. Normann: Yes.

Deputy Commissioner Henderson: Gentlemen, both sides having rested their case, that concludes the hearing. I may state the transcript of testimony in this case will be returned to the Deputy Commissioner of the 13th Compensation District in California for his decision.

The court reporter will show the hearing was concluded at 12:27 p.m.

(Thereupon the hearing was adjourned at 12:27 p.m.)

State of Louisiana,
Parish of Orleans—ss.

I, Earle J. Christenberry, Official Reporter, New Orleans, Louisiana, certify that the foregoing pages 1 through 70, inclusive, are a true and accurate transcript of my shorthand notes taken at the hearing on June 4, 1946, continued to July 2, 1946, and further continued and held on July 16th, 1946.

/s/ EARLE J. CHRISTENBERRY,
Official Reporter. [62]

State of California,
City and County of San Francisco—ss.

G. N. Weeks, being first duly sworn, deposes and says that he is the Asst. Marine Secretary of the Fireman's Fund Insurance Company, a corporation, one of the libelants in the above matter; that he has read the foregoing Libel for Injunction and knows the contents thereof; and that the same is true of his own knowledge, except as to the matters which are therein stated upon his information or belief, and as to those matters that he believes it to be true.

/s/ G. N. WEEKS.

Subscribed and sworn to before me this 30th day of June, 1947.

[Seal] /s/ LAURA L. MacHUGH,
Notary Public in and for the County of San Francisco, State of California.

My commission expires Jan. 15, 1948.

[Endorsed]: Filed July 2, 1947. [63]

In the District Court of the United States,
Southern District of California, Central Division

Civil Action No. 7284 M

CALIFORNIA SHIP SERVICE COMPANY and
FIREMEN'S FUND INSURANCE COM-
PANY,

Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner,

Respondent.

ANSWER OF RESPONDENT PILLSBURY

Now comes the respondent, Warren H. Pillsbury, deputy commissioner, and for his answer to the libel for injunction herein:

- (1) Admits the allegations contained in Articles I, II, III, IV, V and VI of the libel.
- (2) Denies the allegations contained in Article VII of the libel.
- (3) Denies the allegations contained in Article VIII of the libel to the effect that the compensation order is not in accordance with law.

Further answering the libel the respondent deputy commissioner [64] avers that as shown by the transcript of testimony taken before Deputy Com-

missioner Henderson on June 4, 1946, and July 16, 1946, the findings of fact in the compensation order complained of except the finding that the deceased's average weekly wage exceeded \$37.50, are supported by evidence and under the law such findings are final and conclusive and not subject to judicial review; that the parties stipulated at the hearing before the deputy commissioner to an average weekly wage of \$29.62 (T. 11) and there was no other evidence in the record before the deputy commissioner of the deceased's earnings for substantially the whole of the year preceding his injury upon which to make a determination of the deceased's average weekly wage as provided in section 10 of the Longshoremen's Act (33 U.S.C.A. sec. 910).

Wherefore, this respondent prays that judgment be entered herein remanding the case to the respondent, Deputy Commissioner Pillsbury, to make a new finding with reference to the deceased's average weekly wage at the time of his injury, and to adjust the amounts of the awards accordingly, and that the compensation order in all other respects be affirmed and that the libel be dismissed.

/s/ JAMES M. CARTER,

United States Attorney.

/s/ CLYDE C. DOWNING,

Assistant United States Attorney, Attorneys for Respondent Pillsbury.

[Endorsed]: Filed Nov. 3, 1947. [65]

[Title of District Court and Cause.]

RESPONDENT'S MOTION FOR SUMMARY JUDGMENT

Now comes the respondent, Warren H. Pillsbury, deputy commissioner by his attorneys and moves this Honorable Court to enter upon the pleadings and upon the record herein, summary judgment in favor of the respondent, dismissing the action and in support thereof says:

(1) That, as shown by the pleadings and record filed herein, the claimant does not state a cause of action or claim against this defendant upon which relief could be granted.

(2) That, as shown by the pleadings and record filed herein, the findings of the deputy commissioner in the compensation order complained of (with the exception of the finding as to the deceased's [66] average weekly wage) are supported by evidence in the transcript of testimony taken at the hearings before the deputy commissioner and, under the law, said findings of fact are final and conclusive and not subject to judicial review.

(3) That, as shown by the pleadings and the record filed herein, the compensation order complained of is in accordance with law.

(4) That the pleadings show that there is no issue as to any material fact and that the respondent is, as a matter of law, entitled to judgment as

prayed for in the answer, remanding the case and dismissing the complaint.

/s/ JAMES M. CARTER,

United States Attorney.

/s/ CLYDE C. DOWNING,

Assistant United States Attorney, Attorneys for
Respondent Pillsbury.

[Endorsed]: Filed Nov. 3, 1947. [67]

At a stated term, to wit: The September Term, A.D. 1947, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of December, in the year of our Lord one thousand nine hundred and forty-seven.

Present: The Honorable Paul J. McCormick,
District Judge.

[Title of Cause.]

For (1) setting for trial, and (2) motion of respondent for summary judgment; L. B. Gallagher, Esq., present for libellant; Clyde C. Downing, Esq., present at end of session, for respondent;

Court orders cause continued to Feb. 13, 1948, for said proceedings. [68]

[Title of District Court and Cause.]

ANSWER OF RESPONDENT PILLSBURY

Now comes the respondent, Warren H. Pillsbury, deputy commissioner, and for his answer to the libel for injunction herein;

- (1) Admits the allegations contained in Articles I, II, III, IV, V and VI of the libel.
- (2) Denies the allegations contained in Article VII of the libel.
- (3) Denies the allegations contained in Article VIII of the libel to the effect that the compensation order is not in accordance with law.

Further answering the libel the respondent deputy commissioner avers that as shown by the transcript of testimony taken before Deputy Commissioner Henderson on June 4, 1946, and July 16, 1946, the findings of fact in the compensation order complained of except the finding that the deceased's average weekly wage exceeded \$37.50, are supported by evidence and under the law such [69] findings are final and conclusive and not subject to judicial review; that the parties stipulated at the hearing before the deputy commissioner to an average weekly wage of \$29.62 (T. 11) and there was no other evidence in the record before the deputy commissioner of the deceased's earnings for substantially the whole of the year preceding his injury upon which to make a determination of the de-

ceased's average weekly wage, as provided in section 10 of the Longshoremen's Act (33 U.S.C.A. Sec. 910).

Wherefore, this respondent prays that judgment be entered herein remanding the case to the respondent, Deputy Commissioner Pillsbury, to make a new finding with reference to the deceased's average weekly wage at the time of his injury, and to adjust the amounts of the awards accordingly, and that the compensation order in all other respects be affirmed and that the libel be dismissed.

/s/ JAMES M. CARTER,
United States Attorney.

/s/ CLYDE C. DOWNING,
Assistant United States
Attorney.

[Affidavit of service by mail attached.]

[Endorsed]: Filed Dec. 4, 1947. [70]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 16th day of February, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Chas. C. Cavanah,
District Judge.

[Title of Cause.]

For hearing (1) motion of respondent for summary judgment and (2) trial; L. B. Gallagher, Esq., appearing as proctor for libelants; Clyde C. Downing, Esq., Ass't U. S. Att'y, appearing as proctor for respondent; at 10:47 a.m., both sides answer ready;

Attorney Gallagher makes a statement to the Court on behalf of libelants and refers the Court to libelant's brief in opposition to motion for summary judgment. Attorney Downing makes a statement to the Court on behalf of respondent.

Respective counsel make further statements of the respective contentions of the libelants and of the respondent.

The Court orders the said motion for summary judgment taken under advisement until 3 p.m. today. At 11:10 a.m. court recesses until 3 p.m. today.

At 3 p.m. court reconvenes in this case and counsel for respondent being present, and counsel for libelants being absent, and later, at 3:12 p.m., counsel appearing for libelants, and counsel for respondent being present as before, the Court makes a statement that there is a material issue of fact to be settled on this record and which cannot be settled by a Summary Judgment, and orders that said motion of respondent for summary judgment is de-

nied. The Court orders that counsel proceed with the case on its merits.

Attorney Gallagher makes a statement that libelants will submit the case on the merits on the record sent up by the respondents and on the argument presented this morning, and the brief of libelants filed [72] in response to the motion for summary judgment, and asks time for the proceedings this morning to be written up by the court reporter.

Attorney Downing makes a statement and states he will submit the case on the Memorandum of the Respondent filed in support of the motion for summary judgment and the record.

Statements are made by the Court and by respective counsel.

On motion of counsel for respondent, it is ordered that Resp. Ex. A, which is a transcript of testimony, certified by Warren H. Pillsbury, etc., under date of July 17, 1947, at San Francisco, order admitted into evidence, and same is so marked. The Court orders this cause stand submitted for decision, and that counsel submit their respective statements and the reporter's transcript of proceedings this day to the Court in the next few days. [73]

At a stated term, to wit: The February Term, A.D. 1948, of the District Court of the United States of America, within and for the Central Division of the Southern District of California, held at the Court Room thereof, in the City of Los Angeles on Monday, the 1st day of March, in the year of our Lord one thousand nine hundred and forty-eight.

Present: The Honorable Chas. C. Cavanah,
District Judge.

[Title of Cause.]

At this time the Court makes a statement and gives its oral decision in this cause which was heretofore heard on its merits and submitted, and orders judgment in favor of respondent, and directs that counsel for the respondent prepare, serve and present proposed findings of fact and conclusions of law, and judgment for signature. The clerk is directed to notify counsel of this order. [74]

[Title of District Court and Cause.]

OBJECTIONS TO PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Libelants respectfully decline to approve as to form the proposed Findings of Fact and Conclusions of Law submitted to proctors for libelants and returned without approval herewith, upon each of the following grounds:

I.

There was no trial de novo.

II.

The Court did not conduct any trial of any disputed issue of fact.

III.

No evidence was introduced in the sense that oral testimony was offered or received for the purpose of proving or tending to prove any issue of fact raised by the pleadings. [75]

IV.

The only questions submitted to the Court for decision were questions of law as raised by the pleadings, memoranda of points and authorities and the oral proceedings on respondent's motion for a summary judgment.

V.

The sole province of the Court in this matter, in the absence of a trial de novo of jurisdictional or fundamental facts, is to enjoin the award in accordance with the prayer of the libel or to dismiss the libel in the event the Court is justified in concluding that the procedure adopted and pursued by the Deputy Commissioner and the Compensation Order were and each thereof was in accordance with law.

VI.

Libelants respectfully refer the attention of this Honorable Court to the manner and method by which the Honorable Paul J. McCormick, Senior District Judge, disposed of a libel for an injunc-

tion in the matter entitled in the United States District Court, Southern District of California, Southern Division, Freeman Steamship Company, et al., Libelant, v. Warren H. Pillsbury, Deputy Commissioner, U. S. Employees' Compensation Commission, Respondent, No. 706.

Respectfully submitted,

LASHER B. GALLAGHER,
JOHN R. BLACK,
EDWARD R. KAY,

By /s/ LASHER B. GALLAGHER,
Proctors for Libelants. [76]

Entered Mch. 15, 1948.

/s/ CHARLES C. CAVANAH,
Judge.

Received copy of the within Objections this 15th day of March, 1948.

JAMES M. CARTER,
U. S. Atty.

By /s/ GERTRUDE M. JOHNSON,
Proctors for Respondent.

[Endorsed]: Filed Mar. 15, 1948. [77]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above-entitled cause came on regularly for trial before the Honorable Charles C. Cavanah, Judge of the District Court of the United States for the Southern District of California, on the 13th day of February, 1948, and the trial was completed on said date. The cause was tried before the Court sitting without a jury.

Libelants, California Ship Service Company, and Fireman's Fund Insurance Company, appeared at said trial by Lasher B. Gallagher, their attorney of record, and the defendant, Warren H. Pillsbury, Deputy Commissioner of the 13th Compensation District of the United States Employees Compensation Commission, appeared by Clyde C. Downing, Assistant United States Attorney, as his attorney of record; and evidence having been introduced and cause submitted to the Court and the Court being fully advised in the premises, authorized the findings of fact and conclusions of law as hereinafter set out. [78]

The Court, therefore, now makes its findings of fact and conclusions of law as follows, and directs the entry of judgment accordingly thereon:

FINDINGS OF FACT

That libelant, California Ship Service Company, at all times herein mentioned, has been, and is now a corporation. That libelant, Fireman's Fund In-

insurance Company, at all times herein mentioned, has been, and is now a corporation. That on the 6th day of December, 1945, Robert Johnson, Jr., was in the employ of the employer above named at Los Angeles Harbor in the State of California in the 13th Compensation District established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company. That on said day said employee while performing service for the employer as a laborer and engaged at ship repair operations on a completed vessel on navigable waters of the United States at said harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in death the same day as follows: He fell from a ladder while descending into a tank of the ship, sustaining fatal injury. That the employer furnished the employee with medical treatment, etc., in accordance with Section 7(a) of the said Act.

That the average weekly earnings of the employee at the time of his injury exceeded \$37.50.

That the employee left surviving him and dependent in fact upon him for support his Mother, Louise Johnson, Sr., born December 28, 1905, and an adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson, born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson, born February 29, 1929; Edwin Johnson, born July 22, 1930; Hilda Mae Johnson,

born March 30, 1932; Harold Johnson, born April 4, 1934; Walter Johnson, born June 22, 1936, and Romalis Johnson, born November 20, 1940. That claimants [79] Louise Johnson, Sr., Lucille Idel Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson, and Romalis Johnson are entitled to a death benefit at the rate of 25 per cent of the average weekly wages of the employee for Louise Johnson, Sr., his mother, and 15 per cent of said weekly wages for each of the said minor brothers and sisters, the share of each minor child to run until such child reached or will reach the age of 18 years; provided, however, that the total allowance to all dependents may not exceed $66\frac{2}{3}$ per cent of the said average weekly wages or \$25.00 a week. That such death benefit at the rate of \$25.00 a week shall be paid to Louise Johnson, Sr., for the support and maintenance of herself and said minor children commencing with the date of the death of Robert Johnson, Jr. That the amount accrued to and including the date of the hearing July 2, 1946, 29 $\frac{5}{7}$ weeks, is \$742.85, no part of which has been paid.

That Louise Johnson, a sister born December 11, 1922, was wholly dependent upon the deceased employee at the time of his death for her support, but was over the age of 18 years, and has not been shown to have been physically or mentally incapacitated from earning her living and is not entitled to share in said death benefit. That a child of said Louise Johnson, Joseph Charles Forest Johnson, born October 19, 1945, was a nephew of the

deceased employee and wholly dependent upon him for support at the time of his death, but is not within the relationship to the employee within which valid claim may be made of death benefit.

That the reasonable expense of burial to the employee was over \$200.00, and that \$511.75 is owing thereon by claimant to W. D. Fisher & Son, Inc., undertakers, 4700 Avalon Blvd., Los Angeles; that claimants are entitled to an allowance of \$200.00 upon said burial expense to be paid direct to said undertaker.

That J. Warren Woodville, claimant's attorney, 821 Maison Blanche Building, New Orleans 16, La., has rendered legal service to claimants in the above matter in the present claim for which a fee is approved in the sum of \$65.00 and lien granted thereon on compensation herein awarded. [80]

From the foregoing findings of fact, the Court makes the following:

CONCLUSIONS OF LAW

I.

That said findings of fact and award or Compensation Order are in accordance with law for the reason that said findings are supported by substantial evidence introduced in said proceeding before said Commissioner.

II.

That the libelants are not entitled to a mandatory or other injunction directed to said Commissioner to set aside certain findings of fact and award or compensation award or to amend said

findings of fact and award or compensation order in any particular, and that respondents are entitled to judgment dismissing plaintiff's complaint and for his cost of suit herein expended.

Dated: This 15th day of March, 1948.

/s/ CHARLES C. CAVANAH,
Judge, United States District
Court.

Not approved as to form; and affirmatively disapproved and objected to as indicated in written objections to findings filed simultaneously with the lodging of these proposed findings of fact and conclusions of law.

/s/ LASHER B. GALLAGHER,
Attorney for Libelant.

[Endorsed]: Filed Mar. 15, 1948. [81]

In the District Court of the United States in and
for the Southern District of California,
Central Division

No. 7284-M Civil

CALIFORNIA SHIP SERVICE COMPANY, a
corporation, and FIREMAN'S FUND IN-
SURANCE COMPANY, a corporation,
Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,
Respondent.

JUDGMENT

The above-entitled matter having come on regularly for hearing on the 13th day of February, 1948, before the above-entitled Court, the Honorable Charles C. Cavanah, Judge Presiding, and the matter having been heard and the findings of fact and conclusions of law having been signed and filed herein, and the Court being fully advised:

It Is Now Ordered, and Decreed that Complainant take nothing by reason of its complaint on file herein, and that the same be, and is hereby, dismissed, and respondents are awarded costs of suit incurred herein.

Costs taxed at \$25.00.

Dated: This 15th day of March, 1943.

/s/ CHARLES C. CAVANAH.

Judge, United States District
Court.

Not Approved As to Form or Otherwise.

/s/ LASHER B. GALLAGHER.

Attorney for Libelants.

[Endorsed]: Filed Judgment entered and Docketed March 15, 1943. Book C. O. 49, Page 309. [32]

[Title of District Court and Cause.]

PETITION FOR APPEAL

To the Honorable Paul J. McCormick, Judge of the
United States District Court, Southern District
of California, Central Division:

Libelants respectfully pray that they and each of
them may be permitted to take an appeal from the
final decree entered in the above Court on March 15,
1943, to the United States Circuit Court of Appeals,
for the Ninth Circuit, for the reasons specified in
the Assignments of Error which are filed herewith.

Dated May 14, 1943.

/s/ LASHER B. GALLAGHER.

Proctor for Libelants.

[Endorsed]: Filed May 14, 1943. [53]

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

Now come the Libelants and hereby assign the following errors in the above entitled proceedings:

I.

The district court erred in failing to set aside the compensation order upon the ground that the same is not in accordance with law.

II.

The district court erred in deciding, ruling and concluding that the surviving mother as a parent of the deceased was entitled to 25 per centum of "average weekly earnings of the employee, with a base rate of \$37.50," and that the minor brothers and sisters are entitled in addition to 15 per centum per week of said sum of \$37.50, and the said district court erred in its [84] construction of the Longshoremen's and Harbor Workers' Compensation Act in this respect regardless of whether or not the said persons were or either of them was dependent upon the deceased at the time of the injury which caused his death.

III.

The district court erred in deciding, ruling and concluding that the Longshoremen's and Harbor Workers' Compensation Act entitles a surviving mother and surviving minor brothers and sisters, or either of said classes of persons, to a compensation order which will result in the payment to both or either of said classes the maximum sum of \$7500.00,

regardless of whether or not said persons were totally or partially dependent upon the deceased at the time of the injury which caused his death and regardless of the period of time preceding the injury causing the death during which such persons were or either of them was actually dependent upon such employee.

IV.

The district court erred in deciding, ruling and concluding that each and every class of persons, regardless of relationship and regardless of legal duty existing on the part of the employee to support the claimant of a death benefit, is entitled to collect the maximum death benefit of \$7500.00 from the employer or the employer's insurance carrier, and in deciding and concluding that totally or partially dependent surviving parents and minor brothers and sisters are in exactly the same class and entitled to exactly the same maximum award as a surviving wife or surviving natural and totally dependent children of the deceased.

V.

The district court erred in refusing to set aside and enjoin the enforcement of the compensation order upon the ground that there is no evidence, substantial or otherwise, in the record of the proceedings before the deputy commissioner showing that [85] there was no surviving wife or natural child of the deceased; it being the contention of libelants that substantial proof of the non-existence of a lawful wife or natural child of the deceased is

a jurisdictional prerequisite to the making of a compensation order for the benefit of a surviving parent or surviving minor brothers or sisters.

VI.

The district court erred in failing to find, decide, conclude or rule, one way or the other, upon the contention of libelants that there was no substantial evidence upon which the deputy commissioner could find that any claimant was dependent, totally or partially, upon the deceased at the time of the injury which caused his death.

VII.

The district court erred in refusing to find, decide, conclude or rule, that there is no substantial evidence in the record of the proceedings before the deputy commissioner to support any finding, express or implied, that minor brothers or sisters of the deceased were or either of them was dependent upon the deceased at the time of the injury which caused his death.

VIII.

The district court erred in finding that the average weekly earnings of the deceased exceeded \$37.50 per week in the face of a definite and specific stipulation entered into by the parties involved in the proceedings before the deputy commissioner that the average weekly wage of the deceased was the sum of \$29.62.

IX.

The district court erred in making findings of fact upon the theory that the said district court had

tried the issues de novo when the sole and only province of said district court was to determine whether the compensation order was or was not in accordance with the law. [86]

Dated: May 13th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Endorsed]: Filed May 14, 1948. [87]

[Title of District Court and Cause.]

BOND FOR COSTS ON APPEAL

Know All Men By These Presents:

Whereas, Libelants, California Ship Service Company, a corporation, and Fireman's Fund Insurance Company, a corporation, have or are about to appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from that certain final decree heretofore made and entered in the above entitled cause on March 15, 1948; and

Whereas, Fireman's Fund Indemnity Company, a corporation, organized and existing under and by virtue of the laws of the State of California and qualified to act as a surety in this Court, is held and firmly bound unto the Respondent here in and unto whom it may concern in the sum of Two Hundred Fifty Dollars (\$250.00), for the payment of which and truly to be made it does hereby bind itself, its successors and assigns firmly by these

presents [88] and agrees that in case of default or contumacy on the part of the said Appellants, California Ship Service Company, a corporation, and Fireman's Fund Insurance Company, a corporation, execution may issue against it, its goods, chattels and lands;

Now, Therefore, the condition of this obligation is such that if the above named Appellants, California Ship Service Company, a corporation, and Firemen's Fund Insurance Company, a corporation, shall prosecute said appeal with effect, and pay all costs which may be awarded against them as such Appellants if the appeal is not sustained, then this obligation shall be void, otherwise the same shall be and remain in full force and effect.

Dated: Los Angeles, California, May 7th, 1948.

FIREMAN'S FUND

INDEMNITY COMPANY,

[Seal] By /s/ A. I. STODDARD,

Attorney-in-Fact.

Examined and recommended for approval as provided in Rule 13.

/s/ LASHER B. GALLAGHER,

Proctor for Appellants.

I hereby approve the foregoing Bond this 14th day of May, 1948.

/s/ PAUL J. McCORMICK,

United States District Judge.

State of California,
County of Los Angeles—ss.

On this 7th day of May, 1948 before me, M. E. Beeth, a Notary Public in and for said County, State aforesaid, residing therein, duly commissioned and sworn, personally appeared A. I. Stoddard, known to me to be the person whose name is subscribed to the within instrument as the attorney in fact of Fireman's Fund Indemnity Company and acknowledged to me that he subscribed the name of Fireman's Fund Indemnity Company thereto as principal, and his own as attorney in fact.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the said County of Los Angeles the day and year in this certificate first above written.

[Seal] /s/ M. E. BEETH,
Notary Public in and for the County of Los Angeles, State of California.

My Commission expires March 24, 1949.

[Endorsed]: Filed May 14, 1948. [89]

[Title of District Court and Cause.]

ORDER ALLOWING APPEAL

The petition of libelants for an appeal from the final decree entered in the above entitled cause on March 15, 1948, is hereby granted and the appeal is allowed.

It Is Hereby Ordered, that a certified transcript

of the record herein be forthwith transmitted to the United States Circuit Court of Appeals for the Ninth Circuit.

Dated at Los Angeles, California, this 14th day of May, 1948.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed May 14th, 1948. [90]

[Title of District Court and Cause.]

NOTICE OF APPEAL

The libelants hereby appeal and each of them appeals to the United States Circuit Court of Appeals for the Ninth Circuit from the final decree of this Court entered herein on March 15, 1948, and from each and every part thereof.

Dated: May 10th, 1948.

/s/ LASHER B. GALLAGHER,

Proctor for Libelants.

To: Edmund L. Smith, Clerk, United States District Court. James M. Carter, United States Attorney; Clyde C. Downing, Assistant United States Attorney, 600 Federal Building, Los Angeles 12, Calif.; Proctors for Respondent.

Mailed copy to Clyde C. Downing, attorney for respondent, 600 Federal Bldg., L. A. 12.

[Endorsed]: Filed May 14, 1948. [91]

[Title of District Court and Cause.]

NOTICE OF FILING BOND FOR COSTS
ON APPEAL

To the Respondent above named and to his Proctors,
James M. Carter, United States Attorney and
Clyde C. Downing, Assistant United States At-
torney:

You And Each of You Will Please Take Notice
that the bond for costs on appeal herein was ap-
proved by the Honorable Paul J. McCormick, and
was filed in the office of the Clerk of the above en-
titled Court, on May 14th, 1948, and said bond was
executed and given by the Fireman's Fund Indem-
nity Company, a corporation, authorized to execute
surety bonds pursuant to the laws of the State of
California, said bond being in the sum of Two Hun-
dred Fifty Dollars (\$250.00), and is by reference
thereto made a part of this Notice.

Dated: May 17th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 18, 1948. [92]

[Title of District Court and Cause.]

STIPULATION

It Is Hereby Stipulated that, in lieu of a copy thereof, the original record of proceedings as returned by the Deputy Commissioner and on file in the office of the Clerk of the above Court in the above matter, may be transmitted to the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit for use in printing the Apostles on Appeal and may then be returned to the Clerk of the above Court.

Dated: May 28th, 1948.

/s/ LASHER B. GALLAGHER,

Proctor for Libelants.

JAMES M. CARTER,

United States Attorney.

RONALD WALKER and

CLYDE C. DOWNING,

Assistant United States Attys.

/s/ CLYDE C. DOWNING,

Proctors for Respondent. [94]

It Is So Ordered.

Dated: May 28, 1948.

/s/ PAUL J. McCORMICK,

United States District Judge.

[Endorsed]: Filed May 28, 1948. [95]

[Title of District Court and Cause.]

PRAECIPE FOR APOSTLES
ON APPEAL

To the Clerk of the above entitled Court:

I hereby request that the record on appeal in the above entitled cause include the following:

1. Libel.
2. Answer of Respondent.
3. Motion for Summary Judgment.
4. Findings of Fact and Conclusions of Law.
5. Judgment or Decree.
6. Objections to Proposed Findings of Fact and Conclusions of Law.
7. All Minute Orders entered by the above entitled Court in the above entitled cause.
8. Petition for Appeal. [96]
9. Assignments of Error.
10. Order Allowing Appeal.
11. Bond for Costs on Appeal.
12. Notice of Appeal and Affidavit of Service on Respondent.
13. Citation and acknowledgment of service of copy of Citation, Petition for Appeal, Order Allowing Appeal and Assignments of Error.
14. Notice of Filing Bond for Costs on Appeal and Affidavit of Service by Mail.
15. All oral proceedings.
16. All exhibits.
17. Entire record of proceedings upon which the respondent Deputy Commissioner made and

entered the compensation order involved herein as returned by said Deputy Commissioner and on file in the office of the Clerk of the above entitled Court.

18. Transcripts of all oral proceedings before the Respondent Deputy Commissioner, or any other deputy commissioner to whom the matter may have been transferred.
19. Transcript of all oral proceedings, arguments and motions presented to the above entitled Court.
20. Praecipe for Apostles on Appeal and Affidavit of Service by Mail.

Dated: May 17th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Libelants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed May 18, 1948. [97]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, Edmund L. Smith, Clerk of the District Court of the United States for the Southern District of California, do hereby certify that the foregoing pages numbered from 1 to 98, inclusive, contain the original Citation and full, true and correct copies of Libel for Injunction Pursuant to Title 33,

U.S.C.A. Sec. 921; Answer of Respondent Pillsbury filed Nov. 3, 1947; Respondent's Motion for Summary Judgment; Minute Order Entered December 1, 1947; Answer of Respondent Pillsbury filed Dec. 4, 1947; Minute Order Entered February 16, 1948; Minute Order Entered March 1, 1948; Objections to Proposed Findings of Fact and Conclusions of Law; Findings of Fact and Conclusions of Law; Judgment; Petition for Appeal; Assignments of Error; Bond for Costs on Appeal; Order Allowing Appeal; Notice of Appeal; Notice of Filing Bond for Costs on Appeal; Stipulation and Order re Original Record; and Praecipe for Apostles on Appeal which, together with copy of reporter's transcript of proceedings on February 16, 1948, and original respondent's Exhibit A consisting of the certified record from the Commissioner, 13th Compensation District, transmitted herewith, constitute the Apostles on appeal to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify that my fees for preparing, comparing, correcting and certifying the foregoing record amount to \$24.80 which sum has been paid to me by appellants.

Witness my hand and the seal of said District Court this 14th day of June, A.D. 1948.

[Seal]

EDMUND L. SMITH,
Clerk.

By /s/ THEODORE HOCKE,
Chief Deputy.

In the United States District Court, Southern
District of California, Central Division

No. 7284-M Civil

CALIFORNIA SHIP SERVICE COMPANY, a
corporation, and FIREMAN'S FUND IN-
SURANCE COMPANY, a corporation,
Libelants,

vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,
Respondent.

REPORTER'S
TRANSCRIPT OF PROCEEDINGS

Los Angeles, California

Monday, February 16, 1948

Honorable Charles C. Cavanah,
Judge Presiding

Appearances:

For the Libelants: Lasher B. Gallagher, Esq.,
458 South Spring Street, Los Angeles, California.

For the Respondent: James M. Carter, United
States Attorney, by Clyde C. Downing, Assistant
United States Attorney, Los Angeles 12, Cali-
fornia. [1*]

(Other court matters.)

* Page numbering appearing at top of page of original Reporter's
Transcript of Record.

The Clerk: No. 7284-M, California Ship Service Company, and others v. Pillsbury.

Mr. Gallagher: Ready for libelant.

Mr. Downing: Ready for the government.

The Court: You may proceed.

Mr. Gallagher: If your Honor please, in this matter the libelant has set forth in the libel what we believe is a full and fair resume of all of the evidence and procedure before the Deputy Commissioner, and we have filed a brief in support of our position here. The brief is supposed to be responsive to a motion for summary judgment, which is in the nature of a demurrer to the libel.

I think if your Honor would examine that brief, all of our points are sufficiently set forth with clarity to enable your Honor to render a decision in the case on the merits.

If your Honor comes to the conclusion that conceding the truth of all of the facts alleged in the petition that the compensation order is not contrary to law, then of course your Honor would have to dismiss the libel and that would be the end of it so far as this court is concerned. However, I would like to call your Honor's particular attention to two propositions. [2]

No. 1, the Deputy Commissioner here transferred the compensation hearing or matter to a Deputy Commissioner down in one of the southern states, and it is the position of the libelant that Deputy Commissioner Pillsbury was without the slightest power to make findings or any award one way or the

other in this case, as under the provision of the Fifth Amendment to the Constitution, which of course is absolutely binding on all federal officers, judicial and quasi-judicial, the libelant here, as defendant or respondent in the compensation hearing, was entitled to procedural due process of law, and that that due process of law was denied the employer and its insurance carrier by Deputy Commissioner Pillsbury attempting to decide the credibility of witnesses and who lied and who didn't lie when he hadn't ever seen the witnesses and didn't hear them testify; and that the findings of fact upon which an award should be based would have to be made by the Deputy Commissioner who actually sees the witnesses.

Now, your Honor will notice in looking over the record that the principal witness for the applicant was a colored woman, and her own attorney would ask her, for instance, for the sake of example, "Are you sitting in that chair now testifying before Mr. So-and-so, the Commissioner?" And she would say, "Yes." Then three minutes later you would ask the witness the same question and she would say, "No." You [3] would ask her whether her deceased son sent her any money in June of 1945, and she would say, "No, ever since my daughter had a common law marriage with a colored boy out in California,"—evidently her definition of a common law marriage was sexual intercourse—"and had a baby as a result of that common law marriage, then my deceased son didn't send me any money at all, he took care of his sister and her baby because that

no-good nigger went off and left her as soon as she had the baby." Then fifteen minutes later she would be asked a question about whether her deceased son sent her any money after the baby was born, and she would say, "Yes, he sent me \$15 for the month of June and \$15 for the month of So-and-so, and \$15 for the month of So-and-so."

When your Honor reads that testimony, I don't think your Honor, looking at it in a fair manner, as your Honor will and always does in performing your functions as a judge, could say upon reading her testimony that there is any substantial evidence in her testimony which would support any finding that this deceased boy did send her anything, because she says yes one minute and no the next, and it is our contention whenever the single witness testifies, "I was in Oakland on January 5, 1945," and then on cross-examination says, "I was in Los Angeles on that day and I didn't travel between the two cities at all," that there is no [4] proof that the witness was anywhere. There is just a flat contradictory destructive proposition set forth in the record.

No. 1-A, and as a corollary to the first proposition, is this: under the statute as it appears to read plainly in a case of this kind if there is a liability for compensation it is restricted to a percentage of the wages earned by the deceased during the dependency of the mother, and the brothers and sisters. It seems to me, if your Honor please, that when the statute uses that language it must mean the wages earned by the deceased prior to his death,

because there couldn't be any dependency upon a dead man. Therefore under the statute the only award which could be made by a Deputy Commissioner, assuming that everything of a jurisdictional nature was established by competent evidence, would be to make an award of the specified percentage of the total wages earned by the deceased from the time the dependency started up to the time of the death, if the dependency existed during that entire period.

What the Commissioner did in this case was to make an award which is practically life insurance, or accident insurance, to the mother and his brothers and sisters, which will amount to the sum of \$7500 if it has to be paid out, and it was done on the theory that these people are going to be dependent from the date of death up to and including the time when \$7500 will have been paid, and I contend that it has [5] got to be a percentage only of the earnings of the deceased during the actual time of the dependency, and that period stopped as of death.

Point No. 2 is that the Deputy Commissioner here made an order transferring the case to the Commissioner down south, and that involves the question of jurisdiction.

I think perhaps I have jumbled my two points together in making the statement that I have, but I believe that that covers the matter so far as we are concerned in reference to the specific points that I desire to call to your Honor's attention orally. The

balance of the position of the libelants is set forth in the memorandum which is in the file, and I assume that it would be a useless waste of your Honor's time for me to stand here and repeat all of those things, because your Honor will read it, and reading it is better than hearing me attempt to expound it again.

Mr. Downing: If the court please, there is now before the court a motion for summary judgment, and there also has been filed an answer on behalf of Warren H. Pillsbury. If the court should deny the motion for summary judgment at this time, proceeding upon the trial of the merits of the case, we would like to offer in evidence on behalf of Warren H. Pillsbury the transcript which has heretofore been filed and is on file in this court now.

Mr. Gallagher: We have no objection to that being [6] received in evidence, if your Honor please.

Mr. Downing: We would like to have it marked in evidence at this time.

Mr. Gallagher: Mr. Downing, might I inquire at this time if there is included in that record the order which was made by the respondent transferring the matter to the Deputy Commissioner in New Orleans?

Mr. Downing: I haven't examined it. I assume there is, Mr. Gallagher.

Mr. Gallagher: I haven't found it. May we stipulate that we can obtain a certified copy of the order that was made by Mr. Pillsbury, and also a copy of any other order made by the official who

would have to make the order retransferring the matter back to Mr. Pillsbury, if there is such an order?

Mr. Downing: We have no objection to having come before the court all records pertaining to this case, either here or in New Orleans.

I have a letter from Mr. Pillsbury in which he states:

“After the customary development of the file the case was transferred to Deputy Commissioner Henderson in New Orleans for the purpose of holding a hearing at that city for convenience of witnesses. This was done and the file returned to me for decision.”

Whatever orders there are growing out of that we have [7] no objection to stipulating that they may be stipulated in evidence, if there are any in existence.

Mr. Gallagher: We would like to have the order itself, if your Honor please. Of course, Mr. Pillsbury's statement in his letter, while it no doubt reflects his opinion, is not anything that is binding on your Honor or on the libelants here. It is no part of the official record.

Mr. Downing: It wasn't given for that purpose. It was simply given for the purpose of showing the matter was transferred to New Orleans. It is for the purpose of showing if there is no order in the file but there is one in existence we have no objection to its being introduced in evidence.

Mr. Gallagher: May we have 10 days within

which to obtain certified copies of all orders of transfer and all orders of retransfer if there are any, to introduce in evidence?

The Court: That would delay the disposition of the case, wouldn't it?

Mr. Gallagher: We can probably get the ones from Mr. Pillsbury within two or three days.

Mr. Downing: Mr. Pillsbury is in town today.

Mr. Gallagher: We can arrange to get copies of those orders within 48 hours.

I am perfectly willing to submit the matter on the merits. [8]

I will withdraw my request, your Honor. It isn't going to do me much good.

The Court: Your motion is for summary judgment.

Mr. Downing: It is our motion for summary judgment.

The Court: Suppose the court grants that? That ends it.

Mr. Downing: Yes.

The Court: If the court denies it——

Mr. Downing: If the court denies it, then we stand on the merits of the case and ask that the file be introduced in evidence. Then we will submit the matter upon the authorities that we have heretofore submitted on the motion for summary judgment, and Mr. Gallagher has submitted his reply.

The Court: There is no testimony to be taken?

Mr. Downing: No testimony to be taken. We contend that the award by Pillsbury is supported

by substantial evidence, and that the court in examination of that transcript, if he finds that it is supported by substantial evidence, is bound by the decision of Mr. Pillsbury. He is the Commissioner.

The Court: He made the order?

Mr. Downing: He made the order, and we contend it is supported by substantial evidence.

Mr. Gallagher: I claim the man who heard the testimony is the only one who could make findings of fact with reference to the credibility of witnesses, and when someone sitting [9] out here in California attempts to decide the credibility of a witness, that that sort of procedure deprives the employer of his property without due process of law.

That is the point that has not been decided, so far as I know, by any court. It has never been raised.

Mr. Downing: We, of course, maintain that an examination of the record and the award of Warren H. Pillsbury will support that award by substantial evidence heard by Mr. Pillsbury.

The Court: He didn't see the witnesses or examine them; that is what he is contending.

Mr. Downing: Some of the witnesses were examined in New Orleans, for the convenience of witnesses, but the whole file was referred back to Mr. Pillsbury for final decision.

The Court: He made the final decision?

Mr. Downing: Yes, he made the award.

The Court: That is what they are attacking?

Mr. Downing: That's right. There is no trial *de novo* contended at this time.

Mr. Gallagher: There are jurisdictional facts in here. I don't know what his Honor is going to do about your motion. If the court grants your motion for summary judgment, then it doesn't make any difference here whether the libelants contend for a trial *de novo* or not. Your position is that under the summary judgment procedure if everything set forth in the [10] libel is true, then the court has nothing to do but to dismiss the libel.

Of course the court cannot dismiss the libel on summary judgment because we allege in the libel that there were errors, serious errors of law committed by Mr. Pillsbury, and whenever a Deputy Commissioner commits an error in law, if it is a substantial error then the whole award is contrary to law and must be suspended.

You can't just sit down and get letters from John Doe and Richard Roe, have no opportunity for cross-examination at all, and be deprived of your property without due process of law by Mr. Pillsbury or a United States District Judge or any other kind of a judge, and in that respect the record shows that Mr. Pillsbury took an arbitrary stand. He asked for certain wage statements, and the employer's representatives went around and got letters from various employers and sent them in and said in a letter to the Commissioner that the employer was willing to have the Commissioner use that information for the sole purpose of deter-

mining the earning capacity, the past earning record of this deceased.

A couple of these employers of this deceased Negro had said that the Negro said he had five dependents, in one case, and he had four in another. Mr. Pillsbury seized on that, because he didn't have any evidence of dependency, and he said he was going to receive those letters as evidence of [11] the fact of dependency.

Well, before the case was decided, before Mr. Pillsbury ever attempted to make any award, he was put on notice in writing that the defendant employer in that case challenged his authority to put those letters into the record as proof of dependency, because it deprived us of the right to cross-examine, and I don't think that any award which is predicated in substantial part upon incompetent documents can stand the scrutiny of a United States District Judge, because if your Honor approved of that kind of arbitrary and capricious conduct on the part of a Deputy Commissioner, then your Honor would say that any man can be deprived of his property without having the right to cross-examine the person who is making the statements. That alone, I respectfully submit, would make it very unusual for your Honor to even consider this motion for summary judgment seriously.

I know there are decisions coming out of the District Courts of Appeal of California holding, with reference to doctors' statements, for instance, an injured applicant brings in a letter from a doctor,

and he offers it in evidence in a compensation hearing, where the rules are just as lax as they can be, almost anything goes, nevertheless the District Court of Appeals said that in the face of an objection by the employer the letter of the doctor cannot be received in evidence unless the applicant produces the doctor [12] in an open hearing for the purpose of permitting the employer to cross-examine him.

You cannot cross-examine a piece of paper.

That is what Mr. Pillsbury did here, and the reason he did it your Honor, I think, will see clearly was because he knew that the testimony of this Negress in New Orleans was so flimsy that no court reading it would come to the conclusion that there was any substantial evidence upon which a finding of dependency could be made by any commissioner. So he got these letters which were sent to him for an entirely different purpose and he seized on those two lines and said to himself, "Here I got them, this says that the Negro told somebody that he had five dependents; the next one said he told somebody he had four dependents"—and he is going to take that as evidence. We objected to it and we claimed that that sort of arbitrary procedure prohibits any court from approving that kind of an award because it violates and contravenes the rights of the employers, the libelants here and its insurance company, contrary to the guarantees of the Fifth Amendment of the Constitution of the United States.

Mr. Downing: If the court please, all of the

points raised by Mr. Gallagher have been discussed in our memorandum in support of the motion for summary judgment, and we at this time are willing to have the matter submitted to the court. [13]

The Court: I will take this motion under advisement and examine the papers and briefs and see if I can reach a conclusion by 2:00 o'clock, and if I should overrule the motion for summary judgment will you be ready to go on?

Mr. Downing: As far as we are concerned, yes.

Mr. Gallagher: Yes, your Honor.

I have another case set before Judge Weinberger at 2:00 o'clock this afternoon, also. I will be there about an hour I think.

The Court: Suppose we take this under advisement and set it for 3:00 o'clock?

Mr. Gallagher: Very well.

Mr. Downing: Thank you.

(Whereupon, at 11:10 o'clock a.m. a recess was taken until 3:00 o'clock p.m. of the same day.) [14]

Los Angeles, California,

Monday, February 16, 1948. 3:00 P.M.

The Court: Gentlemen, in case No. 7284, in which you presented the motion for summary judgment to the court this morning, after considering the entire record I find here that there is a material issue of fact involved on this record which can't be settled by a summary judgment, because the respondent Pillsbury, Deputy Commissioner, in his

motion for summary judgment moves the court that judgment be entered remanding the case to him for making new findings relating to the deceased's average wage, and at the same time that his motion for summary judgment be entered. They are inconsistent. There is left open that issue of fact. He asks that it be remanded back. I will have to deny the motion for summary judgment. So you may proceed, if you wish, now, with the case on its merits.

Mr. Gallagher: We, if your Honor please, will submit the case on its merits to your Honor on the record which has been sent up here by the respondent Pillsbury, and ask that the transcript of the proceedings, which are certified to be the full, entire and complete proceedings before the various deputies commissioner, be received in evidence by your Honor, and that the case be submitted to your Honor for decision on the merits based upon the argument present this morning orally and the brief which the libelants submitted in response to the motion for summary judgment. And I would also ask leave to have time enough to order a transcript and have it written up of this morning's proceedings, so that your Honor may have clearly before you the objections and the nature of the objections which were called to your Honor's attention orally this morning. That shouldn't take very long, because we were only here about a half hour.

The Court: What do you say?

Mr. Downing. We are willing to submit it upon

the memorandum that the government has filed in support of its motion for summary judgment.

The Court: You have no further evidence?

Mr. Downing: We have no further evidence and no further argument.

The Court: You will submit it on the record before the court now?

Mr. Downing: We maintain that the findings of the Commissioner are supported by substantial evidence.

The Court: Counsel raised the question this morning about his rights under the Fifth Amendment of the Constitution, not having an opportunity to see and hear and examine these witnesses before the Commissioner.

It was set for hearing before the Commissioner and they had an opportunity to be there.

The Supreme Court has held in a number of cases, I find, [16] that the findings and report of the Commissioner in these cases, as to the facts, is in a sense conclusive. It is binding on the courts. That is how the court has interpreted that Act as to the character of the witnesses or the weight of the evidence, that they are findings made to the court; the court doesn't review that unless it is against principal law. That is what they have held again and again.

Mr. Gallagher: Your Honor is perfectly correct with reference to the law, but I respectfully call your Honor's attention to a mistake in fact, which I don't blame your Honor for having made. I didn't make any contention to the effect that the libelants

were denied any of their rights under the Fifth Amendment because of any failure of opportunity to cross-examine living witnesses. My point was this: The Deputy Commissioner arbitrarily and capriciously and without any warrant in the law took a piece of paper on which were certain alleged facts, to wit, a statement made by somebody working for a ship service company that this Negro, this deceased Negro, had five dependents; another letter that he had four dependents; and overruled our objection that those pieces of paper were not competent evidence.

We had plenty of opportunity to cross-examine witnesses who appeared and testified, but we didn't have any opportunity to cross-examine that piece of paper which the Deputy Commissioner used as a substantial basis for his finding of [17] dependency. That was the point with reference to the Fifth Amendment to the Constitution. We say the Commissioner had no lawful right whatever to accept those letters making those statements about dependency as proof of the fact. Yet he did it. When he did that he did something which makes the award contrary to law under the decisions. That is why I wanted to get that written up this morning, so your Honor would have exactly what our contention is.

The Court: That is before the court about these letters, that is in the record now?

Mr. Gallagher: Yes, your Honor.

The Court: It is just a question of what is the legal effect of those letters.

Mr. Gallagher: And whether they are competent evidence.

The Court: What is your analysis of this award? What was it under your idea? I have a notation of it, but I want to see if I have it right.

Mr. Gallagher: It is an award of the Commissioner providing for the payment of the maximum benefits which he could possibly have ordered to this mother and the children, until \$7500 have been paid.

The Court: That is the way I noted it.

Mr. Gallagher: That is the limit.

The Court: You are complaining that that is illegal because there is not sufficient evidence to show who of these [18] children were entitled to it?

Mr. Gallagher: Or that the mother was entitled to it. There is no evidence of dependency. And, also, it is illegal because the most that the Commissioner could have awarded, assuming that there was legal evidence of dependency, would be a percentage of the wages earned by the deceased during the period of dependency, which period would have to be up to the death and not after the death.

The Court: Do you agree with him?

Mr. Downing: No, I don't, if the court please. We still maintain that an examination of the transcript will produce substantial evidence to support the award, and that the question of dependency was substantially supported by evidence as reflected in the record of Pillsbury.

The Court: That he didn't have to depend on these letters?

Mr. Downing: I think the court will examine everything that appeared before the Commissioner, and in his examination if he finds that there is substantial evidence to support the award, even though some things were admitted or not admitted, I still think the court is bound to find in favor of the respondent.

The Court: The Supreme Court has held, I find, in a number of cases of this character that the findings of the Commissioner on the facts are the findings of this court; [19] you can't go back of them.

Mr. Gallagher: But if the Commissioner makes a mistake with reference to the introduction of evidence, then that nullifies the whole award. That has also been decided, and I have given the court those citations.

I don't think my friend on the other side really gets one of the points that I make. Where the statute says that an award may be made to a dependent mother, or a mother, or dependent brothers and sisters, of a certain percentage of the wages earned by the deceased during the period of dependency, it must mean that the period of dependency referred to is something which occurred before the man died, because he doesn't earn anything after he is dead.

The Court: You claim this award goes beyond that?

Mr. Gallagher: Yes, it does. And it is not an award based on a percentage of the wages earned by this man during the time that they claim that

these people were dependent. It ignores that as a basis altogether. I don't think the award could be more than \$500 if there is a legal basis for the award, because his earnings during the period that they claim dependency wouldn't exceed a couple of thousand dollars total. Yet this award gives over 10 times more than the man earned during the period of this dependency.

It is restricted to, I think, 25 per cent, or something like that, of the wages of the deceased during the dependency. [20]

The Court: The limit of the award is what, do you contend?

Mr. Gallagher: It is \$7500, that is what it will amount to. But I claim it couldn't exceed \$500 if they had every right in the world to collect it, because the statute says a certain percentage of the wages of the deceased during dependency; and he certainly couldn't earn any wages after he died, unless he is some supernatural being. That is why I wish your Honor would let us have this written up so your Honor could read it.

The Court: Yes.

Mr. Downing: If the court please, there is attached to the petition for injunction a copy of the compensation award, and the award as I read it says:

"That the employer, California Ship Service Company, and the insurance carrier, Fireman's Fund Insurance Company, shall pay to the claimants compensation as follows: To claim-

ants Louise Johnson, Sr., Lucille Ideal Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson, and Romales Johnson, payable to Louise Johnson, Sr., the sum of \$200 upon the burial expense, to be paid to W. D. Fisher & Son, Inc., funeral director, upon the liability of said claimants therefor.

“To claimant Louise Johnson, Sr., for the benefit of herself and said minor children, the sum of \$742.85 forthwith as of July 2nd, 1946, less, however, the sum of \$65 to be deducted therefrom and paid to claimants’ attorney J. L. Woodville upon his lien for attorney’s fees.

“To said claimant Louise Johnson, Sr., for the benefit of herself and said minor children the sum of \$25 a week payable in installments each two weeks beginning with July 3, 1946, until further order of the Deputy Commissioner.”

The Court: That is what he says will run up to about \$7,500?

Mr. Gallagher: \$7500, yes.

The Court: And he died on what date, do you claim?

I might suggest to counsel that you prepare a little statement of the construction that you put on this award and hand it to me, serve it on one another and let me get your view as to the period of this award and how much it is. You can do that.

Mr. Downing: I beg your pardon?

The Court: I say if you will prepare a little

statement as to what you contend when the award would run, between what certain dates, and how much you claim it would be, serve it on counsel and then he can make his reply. You can hand it to me within the next three days? [22]

Mr. Gallagher: Yes.

The Court: Then I will take the matter under advisement.

I cannot send this case back under this prayer of the petitioner for summary judgment. He asks me to send it back to finish up the job. I can't do that. I have to decide whether it will go to final judgment or dismiss it, that is the limit of the summary judgment.

Hand that to me as soon as you can. I have a lot of cases to try, and I will try to check that over. Put at the bottom what you are contending for and that statement. While I have gone through this record, I will go through it again and that way I can get your contention better than from this statement that you have filed here. Be more specific.

Mr. Downing: If the court please, I this morning asked that the transcript of the testimony before Mr. Pillsbury be offered in evidence as Respondent's Exhibit A. I think there was no objection?

Mr. Gallagher: That is right, no objection.

Mr. Downing: May it be marked?

The Court: Very well.

(The document referred to was marked Re-

spondent's Exhibit A, and was received in evidence.)

[Note—Already printed in these Apostles at pages 12 to 67, being the Transcript of Testimony at Hearing Before Deputy Commissioner Joseph H. Henderson at New Orleans, La.]

The Court: That completes the record?

Mr. Downing: Yes. [23]

The Court: I will wait for your statement and check it over. [24]

CERTIFICATE

I hereby certify that I am a duly appointed, qualified and acting official court reporter of the United States District Court for the Southern District of California.

I further certify that the foregoing is a true and correct transcript of the proceedings had in the above entitled cause on the date or dates specified therein, and that said transcript is a true and correct transcription of my stenographic notes.

Dated at Los Angeles, California, this 19th day of February A.D., 1948.

/s/ SAMUEL GOLDSTEIN,

Official Reporter.

[Endorsed]: Filed Mar. 1, 1948.

[Endorsed]: No. 11957. United States Circuit Court of Appeals for the Ninth Circuit. California Ship Service Company and Fireman's Fund Insurance Company, Appellant, vs. Warren H. Pillsbury, Deputy Commission, 13th Compensation District, Appellee. Apostles on Appeal. Upon Appeal from the District Court of the United States for the Southern District of California, Central Division.

Filed June 15, 1948.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals
for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 11957

CALIFORNIA SHIP SERVICE COMPANY, a
corporation, and FIREMAN'S FUND IN-
SURANCE COMPANY, a corporation,
Appellants,
vs.

WARREN H. PILLSBURY, Deputy Commis-
sioner, 13th Compensation District,
Appellee.

STATEMENT OF POINTS ON WHICH
APPELLANTS INTEND TO RELY ON
APPEAL AND DESIGNATION OF PARTS
OF RECORD NECESSARY FOR THE
CONSIDERATION THEREOF

Appellants adopt as their points on appeal the
Assignments of Error appearing in the transcript
of the record in this case.

Appellants request that the record as certified to
the Clerk of the United States Circuit Court of
Appeals, for the Ninth Circuit, be printed in its
entirety.

Dated: June 18th, 1948.

/s/ LASHER B. GALLAGHER,
Proctor for Appellants.

[Affidavit of service by mail attached.]

[Endorsed]: Filed June 21, 1948.

No. 11957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA SHIP SERVICE COMPANY and FIREMAN'S
FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13th
Compensation District,

Appellee.

APPELLANTS' OPENING BRIEF.

LASHER B. GALLAGHER,

458 South Spring Street, Los Angeles 13.

Proctor for Appellants.



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vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13th
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Appellee.

APPELLANTS' OPENING BRIEF.

Jurisdiction.

On the 6th day of December, 1945, one Robert Johnson, Jr., was in the employ of California Ship Service Company, a corporation, as a harbor worker and on said date was working as such harbor worker on navigable waters of the United States at Los Angeles Harbor, in the State of California, and on said date said Robert Johnson, Jr., sustained an injury which caused his death on the same day, to wit, December 6, 1945. Louise Johnson, Sr., was the mother of said Robert Johnson, Jr., and Robert Johnson, Sr., was the father of said Robert Johnson, Jr. Within the time allowed by law the said Louise Johnson, Sr., filed a claim for a death benefit award. After hear-

ings and investigation were conducted the Deputy Commissioner made a compensation order awarding a death benefit to Louise Johnson, Sr., and the six minor brothers and sisters of the deceased.

Appellants (libelants in the court below) within the time allowed by law filed a Libel for an Injunction in the United States District Court, Southern District of California, Central Division, contending that the award was not in accordance with law. Said Libel was filed in the court below pursuant to the Longshoremen's and Harbor Workers' Compensation Act which provides, in part, that:

“If not in accordance with law, a compensation order may be suspended or set aside in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in the federal district court for the judicial district in which the injury occurred. . . .” (Act of Mar. 4, 1927, c. 509, sec. 21, 44 Stat. 1436, as amended June 26, 1936, c. 804, 49 Stat. 1921, 33 U. S. C. A. 921.)

On March 15, 1948, the Honorable Charles C. Cavanah made and there was entered Findings of Fact, Conclusions of Law, and Judgment denying any relief and dismissing the action [Ap. 79-83].

Petition for Appeal was filed May 14, 1948 [Ap. 85]; Assignments of Error were filed May 14, 1948 [Ap. 86-89]; Bond for Costs on Appeal was approved and filed May 14, 1948 [Ap. 89]; Order Allowing Appeal was filed May 14, 1948 [Ap. 91-92]; Notice of Appeal was filed May 10, 1948, and copy thereof mailed to proctors for respondent within the time allowed by law [Ap. 92];

Praecipe for Apostles on Appeal was served and filed on May 17, 1948 [Ap. 95-96].

Jurisdiction of civil causes of admiralty and maritime jurisdiction is vested in the courts of the United States by Article III, Section 2, of the Constitution of the United States, to-wit: "The judicial power shall extend . . . to all cases of admiralty and maritime jurisdiction."

An appeal from a final decree in admiralty is authorized by Section 128a of the Judicial Code (43 Stat. at L. 936, 28 U. S. C. A., Section 225, which provides that a Circuit Court of Appeals shall have appellate jurisdiction to review final decisions).

Statement of the Case.

Robert Johnson, Jr., the deceased, was born on May 22, 1924 [Ap. 23]. On February 11, 1946, a Claim for Compensation (death benefit) was filed by Mrs. Louise Johnson of New Orleans, Louisiana, with the Deputy Commissioner at San Francisco. On February 13, 1946, a copy of said Claim was sent to the employer and insurance carrier by registered mail, for their Answer, and on February 20, 1946, an Answer was filed making a general denial of liability [Ap. 14]. The case was transferred by the Deputy Commissioner of the 13th Compensation District at San Francisco, California, with the approval of the United States Employees' Compensation Commission, to Deputy Commissioner Henderson at New Orleans, Louisiana [Ap. 13]. On July 16, 1946, the claimant appeared before Deputy Commissioner Henderson and was represented by Warren Woodville, Esq., her attorney. The employer and insurance carrier were represented at said hearing by Frank S. Normann [Ap. 18]. At said time the claimant, Louise Johnson, Sr., through her attor-

ney, and the employer and insurance carrier, through their attorney, stipulated to the following facts:

1. That on the 6th day of December, 1945, Robert Johnson, Jr., hereinafter called the decedent, was in the employ of California Ship Service Company, at Terminal Island, in the State of California, in the Thirteenth Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day the decedent herein, while performing service for the employer upon the navigable waters of the United States, sustained accidental injury arising out of and in the course of his employment, and resulting in his disability while he was employed as a laborer on the S/S "California," said vessel being then afloat in the waters of the Pacific Ocean, at Berth 216, at Terminal Island, in the State of California, when, while engaged in ship repair operations on said vessel, he was descending a ladder into a tank and lost his balance and fell to deck of tank and sustained injuries which resulted in his death on December 6, 1946;

2. That written notice of said injury and death was not given within 30 days, but that the employer had immediate knowledge of said injury and death, and that the employer has not been prejudiced by such failure to give such written notice;

3. That the employer furnished the decedent with medical treatment, etc., in accordance with Section 7 (a) of the said Act;

4. That the average weekly wage of the decedent herein, at the time of his injury, amounted to the sum of \$29.62 per week; that full wages were paid for the day of injury and death;

5. That the total amount of the funeral expenses for preparation and burial of the body of the decedent, which was handled by W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles, California, amounted to the sum of \$511.75, of which amount nothing has been paid to the said undertaker by anyone, and another bill amounting to \$192.88 for services rendered by Dennis Mortuary Service, 1940 Eagle Street, New Orleans, which bill has been paid in full by Mrs. Robert Johnson, Sr., the claimant in this case;

6. That the employer and insurance carrier herein have paid nothing as compensation (death benefits) to the claimant herein, and nothing on the burial expenses [Ap. 19-21].

The only witness who testified was Louise Johnson, Sr. The substance of her testimony, in the order in which she gave it, is as follows:

Direct Examination.

I am 42 years of age. I am the mother of Robert Johnson, Jr. Robert Johnson, Sr., is the father. Robert Johnson, Sr., and I were married December 23, 1919, in New Orleans, Louisiana. I and my husband live together. The deceased was born May 27, 1924 [Ap. 22, 23]. When my boy first went out there (the State of Washington or California) he sent me \$30; then he started sending me \$15 a week and after my girl got pregnant out there I didn't get any more.

(At this point Deputy Commissioner Henderson ruled as follows: "With reference to contributions by the decedent, we shall consider only one year prior to the decedent's death, coming back or going back one year to see what contributions might have been made, would seem a sufficiently long period to determine if there was any real dependency or not, so the period back to December 6, 1944, would be sufficient.") [Ap. 25, 26.]

I cannot remember when the deceased first went to California. Before he went to California he was at Bremerton, Washington. I know he sent me the \$30 when he was in California. I don't know what month of the year he sent me the \$30. I know the last time he sent me two \$10 bills in November, 1945, to buy me some Venetian blinds. I just can't remember the last time before that when he sent me any money. I think it was either July or August, 1945, when he sent me \$15. He sent me \$15 in the month of June (1945) [Ap. 26-28].

My daughter went to California in December, 1944, and she got pregnant and he stopped sending money to me. I told him to take care of her; he was running with her all the time. The baby was born in October (1945).

I just can't remember how much I got in May, 1945 [Ap. 28].

I think I got \$30 from him in April, 1945 [Ap. 29].

Between the first day of January, 1945, and the \$30 he sent me for Easter he sent me money in between that time, from January to Easter. The first part of the month regular I got it then but after my daughter got pregnant, he had to pay for her. Before Easter, 1945, I used to get \$15 from him right

along, twice a month, sometimes three times. I think I got \$15 in March. I got \$30 in March, 1945.

He was not sending money regularly in February, 1945. I don't remember if I got any money in February, 1945.

I do not recall if I got any money from the deceased in January, 1945. In December, 1944, I don't know how much money I got from him. That has been a long time. I can't remember that [Ap. 29-31].

I took care of my children with the money he sent me. The money from the decedent was spent on them. I used it to buy clothes and food and send them to school. I graduated one girl on the money he sent me. I used all of the money I told you about that the deceased sent to me for that purpose [Ap. 31, 32].

Cross-Examination.

My oldest daughter Louise is in California. That is the daughter who became pregnant. I don't know when she got pregnant but I know the baby was born October 19, 1945. I told Mr. Woodville that from the time my daughter became pregnant, until the time the baby was born, I did not receive any money from my son. During that time he was taking care of our daughter. She is not married. My son and my daughter were living together at the time he was killed. My daughter did not go to work after her baby was born. My son supported my daughter when she was pregnant and after the baby was born, October 19, 1945, he continued to support my daughter and her little baby [Ap. 33, 34].

My son did not support my daughter during all the time she was pregnant. This fellow she was living with left her after she was four or five months pregnant. She had a common law husband and he left her [Ap. 34, 35].

The common law husband left my daughter about five months before the baby was born. From the time my daughter's common law husband left her, up until the time my son was killed, my son was taking care of my daughter and her baby. My daughter had no other means of support. During that period of time my son did not send me any money at all [Ap. 35, 36].

It is not a fact that from the time that my daughter arrived in California, which was in the early part of December, 1944, that my son supported my daughter all during that time [Ap. 36].

While this common law husband of my daughter lived with her, he supported my daughter [Ap. 37].

When he left her, the dead boy had to support her or did support her; that is what I mean. The decedent in this case continued to support my daughter while she was pregnant until the baby was born on October 19, 1945. During the time that the dead boy supported my daughter, after her common law husband left her, the dead boy did not send me any money because he was using it for his own support and the support of my daughter. After the baby was born up until my son's death, he was supporting my daughter and her baby. The baby was born October 19, 1945, and my son was killed December 6, 1945. From October 19, 1945, when the baby was born, to the day the dead boy was killed, he supported the daughter and baby. During that time, namely, October 19, 1945, to the time of his death, the dead boy did not send me any money during that time because he was using his money for his own support and to support my daughter and her baby [Ap. 38, 39].

From the date the baby was born that shows as proof that my daughter became pregnant right after she got out to California [Ap. 40].

After I learned that my daughter was pregnant, which was the early part of 1945, my son supported my daughter until the baby was born. The dead boy did not send me any money from the time he started taking care of my daughter until his death. From the time my daughter got to California until she took up with this common law husband, my dead boy did support my daughter and from the time she took up with the common law husband until he left her, the common law husband supported her. I don't know how long that was. But whatever time it was, one to five months, during the time the common law husband was supporting my daughter my deceased son sent me money during that time and after the common law husband left my daughter, the dead boy had to go back to supporting my daughter and from that time on didn't send me any money. The dead boy, the deceased in this case, didn't send me any money after my daughter's common law husband left her. In November (1945) he sent me two \$10 bills to get some Venetian blinds. That was all of the money he sent me from the time the common law husband left my daughter until the boy's death—\$20 [Ap. 44-46].

“Q. (By Deputy Commissioner Henderson): Listen carefully: You stated a moment ago in March, 1945, the decedent—the dead boy, sent you \$15 two different times in March, 1945. Now if that is true, then your daughter's common law husband was living with her then, because you have already stated when the common law husband was with your daughter, he supported her; so I take it from what

you stated, that the common law husband was still living with your daughter in March, 1945. Then you stated in April, 1945, the dead boy sent you \$30?

A. Yes.

Q. So if that is true, Mrs. Johnson, the common law husband was with your daughter in April, 1945, and in May you said you don't know if the dead boy sent you any money or not, so in June you stated the dead boy sent you \$15, and July or August he sent you \$15, and November, \$20. So that would seem to indicate that your daughter's common law husband probably lived with her and left her about May, 1945.

A. I don't know. I know he left her.

Q. (Continuing): Because if your statement is true that while the common law husband was with your daughter, the dead boy sent you money, and when the common law husband was not with your daughter, the dead boy did not send you any money; so it would indicate the common law husband left your daughter in about May, because you can't remember if your son sent you any money in May or not, and it would indicate the common law husband may or may not have been with your daughter in June or July, because your son sent you money; because you earlier said your son did not send you any money after your daughter's common law husband left her. So if that is true, do you still say the dead boy sent you \$15 in June, 1945, and \$15 in July or August, 1945? A. *I don't know.*

Q. That is what you told us. But do you still say that is correct? Is that correct to the best of your knowledge? A. That is the best of my knowledge. I am wool-gathered now. I know he sent me money.

Q. We are talking about June, July and August. Do you think that is right, that he sent you \$15 in

June, which might mean the common law husband was living with your daughter, and he sent you \$15 in July or August, and that might indicate the common law husband was still living with your daughter. Now do you say yet, after thinking it over, that you think or say that the dead boy sent you \$15 in June, 1945, and \$15 in July or August, 1945, or now do you think that might be wrong? A. *I can't say.*" [Ap. 47-49.]

My son went to the West Coast in the early part of 1944.

"Q. (By Mr. Normann): When you told the Commissioner he sent you money in June and July and August, you are not (evidently meaning 'now') referring to the year 1944 and not the year 1945, because a few moments ago you testified while your daughter was pregnant and her common law husband left her, your son was not sending you money, but supported your daughter? Answer yes or no. A. I don't know." [Ap. 49.]

Redirect Examination.

My daughter must have become pregnant on or about the 19th day of January, 1945 [Ap. 51]. I have testified that he sent me that money (\$30) for Easter in the month of April [Ap. 51, 52]. When I testified that my son didn't send me any money after my daughter's common law husband left her, I mean he did not send me money regularly. Before my daughter went out there my son sent me money regularly every week. He didn't send me money regularly after the boy left the girl. But he did send me this money that I testified about [Ap. 51, 52].

Recross-Examination.

My husband was working during the time the dead boy was sending me money. At that time my husband was making \$28 a week. There were the same six children that had to be supported at that time and myself and my husband. There were eight in my family. I paid \$12 a month rent and out of my husband's income the whole family had to be supported. My husband's income was not sufficient to meet my living expenses at that time. That was the cause of the child (the deceased son) going to Washington to make more money and help support the family. He worked and helped take care of the family [Ap. 53-55].

The money he sent me after he went to Washington State was to help support me and my children and his father because the father's income was not enough [Ap. 55].

From the foregoing evidence it appears, without conflict that the deceased became an adult person of 21 years of age on May 27, 1945. Between May 27, 1945 and December 6, 1945, the date of the death, the most that can be squeezed out of the testimony with reference to contributions is that the deceased sent \$15 in June, 1945, \$15 in July or August, 1945 and the sum of \$20 as a gift to buy Venetian blinds in November of 1945. In other words, from the time the deceased was in control of his earnings after he became 21 years of age he sent the total sum of \$50. If we consider the testimony with reference to the entire year from December, 1944 to December, 1945, the most that can be squeezed out of the evidence is as follows: Nothing was sent in December, 1944 or January or February, 1945. In March, 1945 \$30 was

sent; in April, 1945 \$30 was sent as an Easter gift; in June \$15 was sent; in July or August \$15 was sent; and in November, 1945, \$20 was sent as a gift to purchase Venetian blinds. Thus \$50 of the total sum during the whole year immediately preceding the death was made up of two gifts, one in the sum of \$30 and the other in the sum of \$20, leaving \$60 for the entire year which might be construed as contributions toward support of the entire family.

Based on the foregoing evidence, Deputy Commissioner Pillsbury found, contrary to the stipulation of the parties "that the average weekly wage of the decedent herein at the time of his injury, amounted to the sum of \$29.62 per week" [Ap. 20] that the average weekly earnings of the deceased at the time of his injury exceeded \$37.50 [Ap. 6] and also found that the claimant and the minor brothers and sisters were totally dependent upon the deceased and made a death benefit award in a sum which would be fixed as a maximum under the law in the event of total dependency [Ap. 6, 7], which award will ultimately require appellants to pay out the sum of \$7500.00.

In the Libel for an Injunction, the appellants alleged as follows:

"The award is not in accordance with law for the following reasons:

1. There is no evidence to support the finding that the average weekly earnings of Robert Johnson, Jr., at the time of his injury exceeded \$37.50, and said finding is directly contrary to the stipulation of the parties that the average weekly wage of the decedent at the time of his injury amounted to the sum of \$29.62. (Exhibit 'A,' pg., lines)

2. There is no evidence to show that there was no surviving wife or child of Robert Johnson, Jr.

3. There is no evidence showing that Louise Johnson, Sr., was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

4. There is no evidence showing that the minor brothers or sisters were or any thereof was dependent upon the deceased Robert Johnson, Jr., at the time of the injury which caused the death of the said Robert Johnson, Jr.

5. No claim for a death benefit was at any time filed by any person excepting Louise Johnson, Sr., and the deputy commissioner had no power or jurisdiction to make or order any award in favor of any minor brother or sister of Robert Johnson, Jr.

6. The award does not provide that payments are to be continued only during any dependency of Louise Johnson, Sr.

7. The award does not provide that payments are to be continued only during any dependency of the minor brothers and sisters of Robert Johnson, Jr.

8. There are no findings as to why or how Louise Johnson, Sr., was a dependent of Robert Johnson Jr.

9. There are no findings with reference to whether or not Louise Johnson, Sr., was dependent upon Robert Johnson, Jr., at the time of the injury which caused the death of said Robert Johnson, Jr.

10. There are no findings with reference to whether or not the minor brothers and sisters of the deceased were dependent upon the deceased at the time of the injury which caused the death of said Robert Johnson, Jr.

11. The award does not provide that payments are to be continued only during dependency.

12. There is no finding that Robert Johnson, Jr., left no surviving wife or child.

13. There is no substantial evidence to support the findings and award, or either thereof." [Article VIII, Ap. 10-11.]

The Honorable Lower Court failed to rule on the allegations in the Libel which raised questions of law and instead tried the case as though the District Court had the authority to try the case *de novo*. The District Court made findings of fact which followed, almost verbatim, the findings of fact which had been made by appellee.

As conclusions of law the District Court held that the findings of fact and award and the compensation order are in accordance with law "for the reason that said findings are supported by substantial evidence introduced in said proceedings before said commissioner" and that the libelants are not entitled to a mandatory or other injunction [Ap. 79-83].

The appellants filed objections to the proposed findings of fact and conclusions of law, in substance setting out the following points: (1) There was no trial *de novo*; (2) That the only questions submitted to the District Court were questions of law; and (3) That the sole province of the District Court, in the absence of a trial *de novo* of jurisdictional or fundamental facts, is to enjoin the award, or dismiss the libel [Ap. 76, 77].

The District Court "found" that the average weekly earnings of the employee at the time of his injury exceeded \$37.50 [Ap. 80]. This finding was made in spite of the Answer filed by appellee in which it was averred that "the findings of fact in the compensation order com-

plained of *except the finding that the deceased's average weekly wage exceeded \$37.50, are supported by evidence*" [Ap. 68-69].

In addition to this the appellee prayed that the case be remanded to the respondent Pillsbury "to make a new finding with reference to the deceased's average weekly wage at the time of his injury, and to adjust the amounts of the awards accordingly" [Ap. 69].

It was thus conceded that the award and the amount thereof were not in accordance with law.

Summary of Argument.

Up until the 27th of May, 1945, under the common law, and the statutes of Louisiana and California, the earnings of the deceased were not his property but belonged as a matter of law to his father. Therefore any money which might have been sent to his mother prior to that date was not what could be called a voluntary contribution. From and after the date when the deceased became 21 years of age, he was a resident of the State of California and the evidence shows that after that date the deceased sent not to exceed \$50, \$20 of which was a gift to buy Venetian blinds and which was not used for the support of the family. Appellants contend that the Deputy Commissioner and the District Court approached and decided the case on the theory that the compensation benefits provided by the Longshoremen's and Harbor Workers' Compensation Act are the same as life insurance and lawfully permit the entry of a death benefit compensation order in the maximum amount of \$7500 payable at the rate of \$25 per week, regardless of whether or not the claimant is totally or partially dependent upon the deceased. Appellants contend that such compensation order is not in accordance with law. The obvious and

basic purpose underlying the theory of workmen's compensation is that an award relieve a properly included beneficiary of the particular economic impact suffered by him or her as a result of the workman's death. Certainly a claimant who might be partially dependent upon a deceased workman was not intended by the Congress to receive exactly the same benefit as one who was totally dependent upon the workman.

Appellants also contend that the total amount of an award in favor of a parent or a minor brother or sister of a deceased workman cannot exceed 25 per centum of the average wages of the deceased, in so far as the parent is concerned, and 15 per centum of the average wages of the deceased for each minor brother and sister and that the percentages relate to the wages earned by the deceased during the time prior to his death when such persons were actually dependent upon the deceased for support.

Appellants also contend that the award is not in accordance with law because there is no evidence showing any dependency of any kind or character as of the time of the injury which caused the death on December 6, 1945.

Appellants also contend that they were entitled to specific rulings with reference to each allegation in Article VIII of the Libel.

The questions involved are raised by the Assignments of Error [Ap. 86-89] and the adopting by appellants "as their points on appeal of the Assignments of Error appearing in the transcript of the record in this case" [Ap. 121].

Specification of Errors Relied Upon.

Appellants rely upon Assignments of Error I, II, III, IV, VI, VII, VIII and IX [Ap. 86-89].

ARGUMENT.

POINT I.

The District Court Erred in Failing to Set Aside the Compensation Order Upon the Ground That the Same Is Not in Accordance With Law.

The District Court Erred in Failing to Find, Decide, Conclude or Rule, One Way or the Other, Upon the Contention of Libelants That There Was No Substantial Evidence Upon Which the Deputy Commissioner Could Find That Any Claimant Was Dependent, Totally or Partially, Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Refusing to Find, Decide, Conclude or Rule, That There Is No Substantial Evidence in the Record of the Proceedings Before the Deputy Commissioner to Support Any Finding, Express or Implied, That Minor Brothers or Sisters of the Deceased Were or Either of Them Was Dependent Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Finding That the Average Weekly Earnings of the Deceased Exceeded \$37.50 Per Week in the Face of a Definite and Specific Stipulation Entered Into by the Parties Involved in the Proceedings Before the Deputy Commissioner That the Average Weekly Wage of the Deceased Was the Sum of \$29.62.

This point involves a consideration of Assignments of Error I, VI, VII and VIII, set forth above and appearing in the Apostles at pages 86 and 88.

As appellants have already pointed out, the record as made before the deputy commissioner at the hearing in

New Orleans contains a stipulation that the average weekly wage of the decedent at the time of his injury, amounted to \$29.62 per week. The finding made by the Deputy Commissioner is that the decedent's average weekly wage exceeded \$37.50. The amount of the award was fixed at $66\frac{2}{3}\%$ of \$37.50. This was clearly an arbitrary finding and has no support whatever in the evidence. Upon this ground alone appellants were entitled to have the compensation order enjoined.

In addition to this the Court made an independent finding, contrary to the stipulated fact in the record, that the average weekly earnings of the employee at the time of his injury exceeded \$37.50. This finding is clearly erroneous for the same reason that the finding made by the Deputy Commissioner was erroneous.

Appellants also contend that there is no evidence in the record which would support a finding that the mother and/or minor brothers and sisters of the decedent were, or that either thereof was, dependent upon the decedent at the time of the injury which caused his death, which was December 6, 1945. Section 909, Subdivision (f) of Title 33, U. S. C. A., provides that "all questions of dependency shall be determined as of the time of the injury." We have shown that in November, 1945, a gift of \$20 was made by the decedent to his mother for the purpose of purchasing Venetian blinds. Certainly this sum cannot be used as support for a finding that this gift was used for the purpose of housing, feeding, clothing or educating any of the minor brothers or sisters or for the purpose of supporting the mother. This item cannot be regarded as a necessity of life. The last payment which might have been used for the purpose of supporting anybody was the contribution of \$15 in July or August,

1945, which was over three months preceding the death of Robert Johnson, Jr. This seems to appellants to be directly in the face of the statute and conclusively establishes a lack of proof of dependency as of the time of the injury. There is nothing ambiguous about the provision of the statute which states that "all questions of dependency shall be determined as of the time of the injury." It is interesting to note that Deputy Commissioner Pillsbury did not find that any of the persons for whose benefit the award was made was dependent upon the decedent at the time of the injury. The finding "that the employee left surviving him and dependent in fact upon him for support his mother, Louise Johnson, Sr., born December 28, 1905, and an adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson, born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson, born February 29, 1929; Edwin Johnson, born July 22, 1930; Hilda Mae Johnson, born March 30, 1932; Harold Johnson, born April 4, 1934; Walter Johnson, born June 22, 1936, and Romalis Johnson, born November 20, 1940" [Ap. 80, 81], is not a finding of dependency *as of December 6, 1945*. Obviously no finding could have been made of even a partial dependency as of December 6, 1945.

Appellants again direct the attention of the Court to the testimony with reference to claimed contributions made regularly prior to December, 1944, and during the minority of Robert Johnson, Jr. In the case of *Standard Dredging Corp. v. Henderson*, 150 F. 2d 78, 80, the Court says:

"Our greatest trouble is with the question of dependency of the father and mother. The deputy commissioner did not discuss it in his findings, but found

generally that they were dependent. The district judge said simply that he thought partial dependence was shown. The deputy commissioner's brief here merely says that there was testimony which if believed showed the deceased sent money home to his parents and contributed to their support. But more than this is necessary to make a case of dependence. Regular contributions voluntarily made tend to show a need for them, but in this case Johnson was a minor of 18 years, hired out by his father, and his earnings above his necessary support belonged to his parents irrespective of their condition of health or finances. 'That he sent them money proves nothing as to their need.' (150 F. 2d, at 80.)

At page 81, the Court also says:

"The death benefits under the Act are not life insurance to be paid to some one in every case, but arise only when the relationships and circumstances exist which are stated in the Act." (150 F. 2d, at 81.)

No claim was filed with the Deputy Commissioner by the minor brothers and sisters of the deceased. The record shows, as hereinabove set out in the Statement of the Case, that only the mother filed a claim. The minor brothers and sisters were not represented at the hearing held in New Orleans, Louisiana, and the only issue with reference to any question of dependency related to whether or not the mother was dependent upon Robert Johnson, Jr., at the time of his injury. At the time of the oral proceedings, Mrs. Johnson's counsel asked her what she did with the money sent to her and she said she took care of her children with it. The next question related to the number of children. Counsel for appellants objected to this upon the ground that "there is no claim here for any

children". Counsel for Mrs. Johnson, who did not at that time represent the children and when no attempt was made to file any claim on behalf of the children, stated that, "If it please the Court, the number of children she had in her family would affect the capacity of what money her husband gave toward her support, and the same people she would have to support herself, would add to the amount of her dependence on the decedent." The Commissioner overruled the objection evidently on the theory that the evidence was admissible not for the purpose of proving dependency on the part of the minor brothers and sisters but for the purpose of proving dependency on the part of the claimant, Mrs. Johnson [Ap. 32].

Due process of law requires the making of a claim by any person who contends a lawful right to a death benefit award. Such claim must be filed prior to the time of any hearing so that the employer and his insurance carrier may have an opportunity to dispute the issue and offer evidence with reference thereto. No such opportunity was accorded appellants in the case at bar.

Section 19 of the Act (33 U. S. C. A., 919) provides that subject to the limitation of time within which a claim for compensation is barred, a claim for compensation may be filed with the Deputy Commissioner and that "the deputy commissioner shall have full power and authority to hear and determine all questions in respect of such claim." The clear meaning of this language is that the Deputy Commissioner has no power or authority to hear or determine any question until a claim for compensation is filed with him by the particular person claiming the right to compensation.

Due process of law is provided for in said Section 19 (b) as follows:

“Within 10 days after such claim is filed the deputy commissioner, in accordance with regulations prescribed by the Administrator, shall notify the employer . . . , that a claim has been filed.” (33 U. S. C. A., 919 (b).)

“The deputy commissioner shall make or cause to be made such investigations as he considers necessary in respect to the claim, and upon application of any interested party shall order a hearing thereon. If a hearing on such claim is ordered the deputy commissioner shall give the claimant and other interested parties at least 10 days notice of such hearing served personally upon the claimant and other interested parties or sent to such claimant and other interested parties by registered mail, and shall within 20 days after such hearing is had, by order, reject the claim or make an order in respect of the claim. If no hearing is ordered within 20 days after notice is given as provided in subdivision (b) the deputy commissioner shall, by order, reject the claim or make an award in respect of the claim.” (33 U. S. C. A., 919 (c).)

Section 19(d) of the Act (33 U. S. C. A., 919 (d)) provides that the employer may present evidence in respect of such claim and may be represented by any person authorized in writing for such purpose.

The Act does not vest in the Deputy Commissioner any authority to add parties to a claim previously filed.

The compensation order is not in accordance with law in so far as the minors are concerned because they did not have a claim on file prior to the hearing. There is nothing in the record to show the existence of any power on the part of the appellee to make an award to the minors.

POINT II.

The District Court Erred in Deciding, Ruling and Concluding That the Surviving Mother as a Parent of the Deceased Was Entitled to 25 Per Centum of "Average Weekly Earnings of the Employee, With a Base Rate of \$37.50," and That the Minor Brothers and Sisters Are Entitled in Addition to 15 Per Centum Per Week of Said Sum of \$37.50, and the Said District Court Erred in Its Construction of the Longshoremen's and Harbor Workers' Compensation Act in This Respect Regardless of Whether or Not the Said Persons Were or Either of Them Was Dependent Upon the Deceased at the Time of the Injury Which Caused His Death.

The District Court Erred in Deciding, Ruling and Concluding That the Longshoremen's and Harbor Workers' Compensation Act Entitles a Surviving Mother and Surviving Minor Brothers and Sisters, or Either of Said Classes of Persons, to a Compensation Order Which Will Result in the Payment to Both or Either of Said Classes the Maximum Sum of \$7500.00, Regardless of Whether or Not Said Persons Were Totally or Partially Dependent Upon the Deceased at the Time of the Injury Which Caused His Death and Regardless of the Period of Time Preceding the Injury Causing the Death During Which Such Persons Were or Either of Them Was Actually Dependent Upon Such Employee.

The District Court Erred in Deciding, Ruling and Concluding That Each and Every Class of Persons, Regardless of Relationship and Regardless of Legal Duty Existing on the Part of the Employee to Support the Claimant of a Death Benefit, Is Entitled to Collect the Maximum Death

Benefit of \$7500.00 From the Employer or the Employer's Insurance Carrier, and in Deciding and Concluding That Totally or Partially Dependent Surviving Parents and Minor Brothers and Sisters Are in Exactly the Same Class and Entitled to Exactly the Same Maximum Award as a Surviving Wife or Surviving Natural and Totally Dependent Children of the Deceased.

This point involves a consideration of Assignments of Error, II, III and IV, set forth above and appearing in the Apostles at pages 86 and 87.

In the argument under Point I, appellants have shown that there is no evidence showing that any of the persons in whose favor the death benefit award was made was dependent upon the deceased at the time of the injury which caused his death.

A reasonable construction of the Longshoremen's and Harbor Workers' Compensation Act with reference to death benefits will clearly show that the award in the case at bar is not in accordance with law. Section 9 of the Act (33 U. S. C. A., 909) provides that "if there be a surviving wife or dependent husband and no child of the deceased" there shall be payable

"to such wife or dependent husband 35 per centum of the average wages of the deceased, during *widowhood*, or dependent *widowhood* with two years compensation in one sum upon remarriage; and if there be a surviving child or children of the deceased, the additional amount of 10 per centum of such wages for each such child; in case of the death of remarriage of such surviving wife or dependent husband, any surviving child of the deceased employee shall have his compensation increased to 15 per centum of such

wages: *Provided*, that the total amount payable shall in no case exceed $66\frac{2}{3}$ per centum of such wages."

It will be seen from the foregoing language that a surviving wife or natural child of a deceased is regarded as entitled to a death benefit award regardless of the question of actual dependency for the reason that the law places upon the husband and father the obligation to take care of the total needs of a wife or child.

The section then provides that if there be no surviving wife or dependent husband or child then for the support of "brothers and sisters, if dependent upon the deceased at the time of the injury, 15 per centum of such wages for the support of each such person and for the support of each parent, . . ., of the deceased if dependent upon him at the time of the injury, 25 per centum of such wages during such dependency."

Appellants contend that there is no reasonable basis which would support an interpretation of the Act leading to a conclusion that the Congress intended to permit an award which will amount to the maximum payment of \$7500.00 in every case regardless of a consideration of the extent to which the deceased contributed to the support of the claimant asserting a right to a death benefit. For the purpose of illustration, appellants will give the following examples:

1. A longshoreman who is married and living with his wife is the father of six minor children. The wife and children have been totally dependent upon and supported by the longshoreman at all times since the marriage and the

respective births of the children. At all times during the marriage the particular longshoreman has earned wages averaging \$75.00 per week and all of the earnings of the longshoreman have been devoted exclusively to the support and maintenance of himself and his family and the education of his children. In such case the award would provide for a weekly payment of 35 per centum of the average wages of the deceased to the surviving wife during widowhood or dependent widowhood with two years compensation in one sum upon remarriage and 10 per centum of such average wages for each such child. Thus the total weekly payment would be \$25.00 with a limit of \$7500.00.

2. An adult longshoreman for ten years preceding his death has been maintaining a home and living with his mother and six minor brothers and sisters each of whom, during all of said time, has been totally dependent upon and supported by such longshoreman. Said longshoreman has also earned during said entire period the average sum of \$75.00 per week and has devoted all of it to the support of himself, his mother and his minor brothers and sisters. In such case the award would be 15 per centum of \$37.50 per week for the support of each such minor brother and sister and for the support of the mother 25 per centum of such wages and the weekly benefit in such case would be limited to a total sum of \$25.00 per week.

3. An adult longshoreman, who is single, has also earned the sum of \$75.00 per week. During the year immediately preceding his death he has sent to his mother contributions toward her support and the support of six minor brothers and sisters, regularly, the sum of \$2.00 per week, making a total contribution for the year in the sum of \$104.00.

It is not reasonable to assume that the Congress intended to impose upon industry the burden of paying to the claimants in the third illustration the same weekly benefit as it provided, or intended to provide, for the claimants in the first and second illustrations.

Appellants contend that while the Congress has the legislative power to impose liability without fault by way of workmen's compensation and death benefit, the statute would be in contravention of that portion of the Fifth Amendment to the Constitution of the United States providing that no person shall be deprived of his property without due process of law, if it were construed to mean that an actual voluntary contribution of not in excess of one hundred dollars in one year toward the support of a mother and six minor brothers and sisters entitles such persons to recover seventy-five times that amount by way of a death benefit award. Such construction of the statute would do violence to the entire theory of the Act.

With reference to this subject, Section 8 of the Act (33 U. S. C. A., 908) provides for the payment of compensation for disability resulting from industrial injury. A clear distinction is made between the amounts of disability awards which may be made by the Deputy Commissioner with reference to permanent total disability, temporary total disability and permanent partial disability. The purpose of Congress is conclusively shown by this method of providing compensation for disability resulting from bodily injury. In other words, the injured employee who suffers

the loss of a thumb is not entitled to as much as one who has lost an arm or a leg.

The extent of the economic impact upon the particular claimant is the basic limit of the amount to which such claimant might be entitled. The Deputy Commissioner and the Honorable trial Judge concluded that the sum of \$7500.00 is to be recovered by all claimants in all death cases regardless of whether or not the claimants are totally or partially dependent upon the longshoreman who has lost his life in an industrial accident. The fact that the law as it existed at all times relevant to the case at bar provides that "the total compensation payable under this chapter for injury or death shall in no event exceed the sum of \$7500.00 (Section 9 (m); 33 U. S. C. A., 914 (m)), does not mean that the total compensation payable under the chapter for death shall in every case amount to the sum of \$7500.00.

In subdivision (d) of Section 9 of the Act (33 U. S. C. A., 909 (d)), it is provided, as appellants read the language therein contained, that there is a clear distinction between the amount which may be awarded to a partially dependent parent or a partially dependent minor brother or sister and the amount which is payable to a surviving wife and natural child of a deceased longshoreman. Keeping in mind that all questions of dependency shall be determined as of the time of the injury, it seems clear that the dependency referred to in the section is dependency prior to the death of the longshoreman. It is

obvious that the deceased in the case at bar could not earn any wages of any kind after his death. It is difficult to understand how any person could be dependent upon another person after the death of such last mentioned person. Appellants contend that the only reasonable construction of said Section 9 of the Act as applicable to the case at bar would be one which restricts the total award in favor of the mother to 25 per centum of the average wages earned by Robert Johnson, Jr., during the time she is able to prove that she was actually dependent upon him if such dependency existed at the time of the injury and a limit of 15 per centum of such average wages earned by Robert Johnson, Jr., during the time the minor brothers and sisters are able to prove that they were actually deepndent upon him if such dependency existed at the time of the injury.

In the case at bar the Robert Johnson, Sr., was at all times working and his earnings of at least \$28.00 per week were used to support the family. If the total amount of \$60.00 sent to the mother (aside from the Easter gift of \$30.00 and the \$20.00 gift for Venetian blinds in November) is compared with the total earnings of the father, the most that could be said is that the dependency was very slight. The father's contribution for a year would be \$1456.00. Thus the percentage of partial dependency would be slightly in excess of four per centum. Under such circumstances the award of a maximum benefit of \$25.00 a week is clearly arbitrary and not in accordance with law.

POINT III.

The District Court Erred in Making Findings of Fact Upon the Theory That the Said District Court Had Tried the Issues De Novo When the Sole and Only Providence of Said District Court Was to Determine Whether the Compensation Order Was or Was Not in Accordance With the Law.

This point involves a consideration of Assignment of Error IX, set forth above and is found in the Apostles at pages 88 and 89.

The law, as applicable to the issues in this case, is clearly settled and pursuant thereto the sole and only power of the District Court was to examine the evidence and findings contained in the record of the proceedings before the Deputy Commissioner and determine therefrom whether, as a matter of law, the award was or was not in accordance with law.

The issues of law were clearly raised by Article VIII of the Libel [Ap. 10, 11]. As appellants understand the law, the District Court in matters of this kind, where there are no fundamental or jurisdictional issues of fact involved, is in the same position as an appellate court on an appeal from a judgment at law. Therefore the opinion or judgment of the District Court should, in all probability, be cast in the form of an opinion or conclusions of law answering in some definite manner the contentions as asserted in the Libel. Appellants understand that a Deputy Commissioner's findings of fact, if supported by evidence, may not be disturbed by a reviewing court (*Cardillo v. Liberty Mutual Co.*, 330 U. S. 469, 477, 478,

67 S. Ct. 801, 91 L. Ed. 1028; *Delta Stevedoring Co. v. Henderson*, 168 F. (2d) 872), and make no contrary contention.

The learned trial Judge did not perform the required functions of the District Court in matters of this kind. The fact that the trial court made findings of fact, and drew therefrom conclusions of law clearly indicates that he proceeded on the theory that there was a trial *de novo* with reference to issues of fact. Appellants brought the point directly to the attention of the trial court by filing objections therein to the proposed findings of fact and conclusions of law [Ap. 76-78]. Article VIII of the Libel [Ap. 10, 11], pointed out appellants' contentions with reference to the lack of evidence to support the essential findings of the Deputy Commissioner. The failure of the Deputy Commissioner to make other required findings was pointed out as follows:

"The award does not provide that payments are to be continued only during any dependency of Louise Johnson, Sr.

"The award does not provide that payments are to be continued only during any dependency of the minor brothers and sisters of Robert Johnson, Jr.

"There are no findings as to why or how Louise Johnson, Sr., was a dependent of Robert Johnson, Jr.

"The award does not provide that payments are to be continued only during dependency." [Subdivisions 6, 7, 8, and 11, Ap. 11.]

In the case of *Standard Dredging Corp. v. Henderson*, 150 F. (2d) 78, the Deputy Commissioner did exactly the same thing which the Deputy Commissioner did in

the case at bar with reference to findings on the question of dependency. In that case the Court said:

“The deputy commissioner did not discuss it (the dependency of the father and mother) in his findings, but found generally that they were dependent.” (150 F. (2d) at page 80.)

In the case at bar the same type of general finding was made by the Deputy Commissioner. He does not find that any of the persons involved was dependent upon Robert Johnson, Jr. at the time of the injury on December 6, 1945 [Ap. 6]. Neither is there any limitation in the award with reference to the cessation of the award.

With respect to these matters, the Court in the case of *Standard Dredging Corp. v. Henderson*, 150 F. (2d) at page 82, states as follows:

“Cessation of dependency can probably be enquired into by resort to the procedure provided in Sect. 14 (h) of the Act, 33 U. S. C. A. §914 (h), or Sect. 22 of the Act, 33 U. S. C. A. §922. But we are of opinion that regularity requires that the award follow the statute in awarding compensation ‘during such dependency.’

“Because the record shows no findings as to why or how the parents were dependent, and whether or not the dependency found to exist at death continued beyond the time of the award, and because the award does not provide that payments are to be continued only during the dependency, we hold that the award ought to be set aside, but without prejudice to a further hearing and the making of such findings and such an award as may appear proper.” (150 F. (2d) at page 82.)

For the same reasons as are assigned by the Court in the case last cited, it is clear that the trial Judge should have enjoined the enforcement of the award and should have directly passed upon the questions of law asserted in Article VIII of the Libel.

Conclusion.

It is respectfully contended that the decree dismissing the Libel should be reversed and that the case should be remanded to the District Court for a proper disposition of the issues of law; or in lieu thereof, that this Honorable Court, in the exercise of its powers in an Admiralty case, enter the final decree which should have been entered by the Honorable District Court.

Respectfully submitted,

LASHER B. GALLAGHER,
Proctor for Appellants.

No. 11957

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

CALIFORNIA SHIP SERVICE COMPANY and FIREMAN'S
FUND INSURANCE COMPANY,

Appellants,

vs.

WARREN H. PILLSBURY, Deputy Commissioner, 13TH
COMPENSATION DISTRICT,

Appellee.

BRIEF FOR APPELLEE DEPUTY COMMIS- SIONER PILLSBURY.

H. G. MORISON,
Assistant Attorney General,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
*Assistant United States Attorney,
Chief, Civil Division,*

MAX F. DEUTZ,
*Assistant United States Attorney,
Los Angeles, California,*

ALVIN O. WEST,
*Attorney, Department of Justice,
Washington, D. C.,
600 Federal Building, Los Angeles 12,
Proctors for Appellee Pillsbury.*

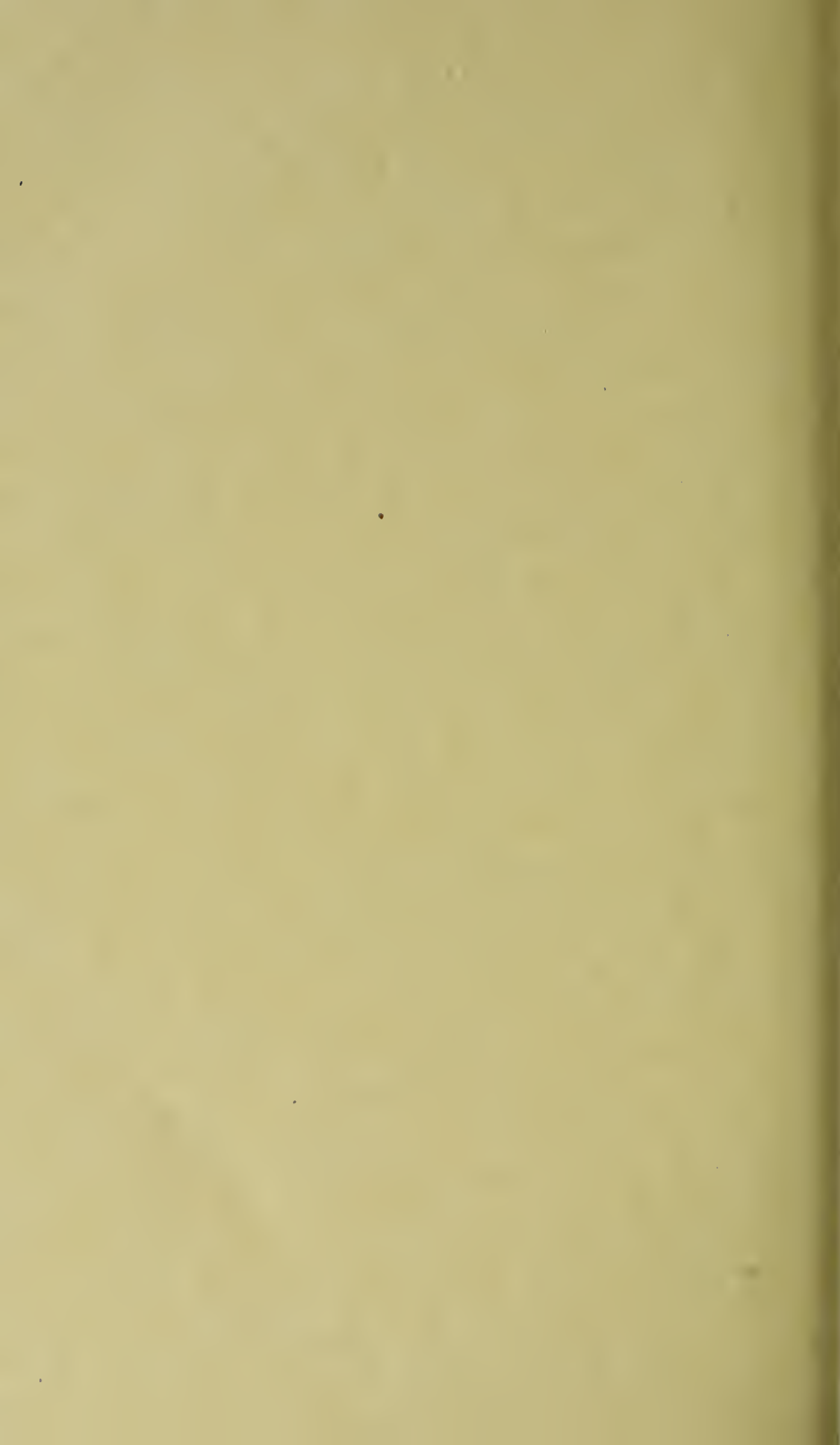
WARD E. BOOTE,
Chief Counsel,

HERBERT P. MILLER,
*Assistant Chief Counsel Bureau of Employees'
Compensation Federal Security Agency,
Of Counsel.*

NOV 10 1948

PAUL P. O'BRIEN,

CLERK



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BRIEF FOR APPELLEE DEPUTY COMMIS- SIONER PILLSBURY.

Statement of the Case.

This is an appeal from a decree of the United States District Court for the Southern District of California, Central Division, Honorable Charles C. Cavanah, District Judge, confirming a compensation order of the Deputy Commissioner filed on June 5, 1947, in which he awarded compensation to Louise Johnson, Sr., mother, and six minor brothers and sisters, respectively, of Robert Johnson, Jr., who sustained fatal injuries on December 6, 1945, in the course of his employment as a laborer by the California Ship Service Company on a vessel in Los Angeles Harbor. The said compensation order was issued pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927 (44 Stat.

1424, 33 U. S. C. A. sec. 901 *et seq.*) The compensation liability of the employer was insured by the Appellant Fireman's Fund Insurance Company.

The claim for compensation was controverted by the employer and insurance carrier, and hearings were duly held before Deputy Commissioner Joseph H. Henderson at New Orleans, Louisiana, on June 4, 1946, and July 16, 1946. The testimony taken at said hearings is printed in the Apostles on Appeal and will be referred to later.

Facts.

The Deputy Commissioner in the compensation order complained of found the facts with reference to the employee's fatal injuries and his family's dependency to be in part as follows:

"That on the 6th day of December, 1945, Robert Johnson, Jr., was in the employ of the employer above named at Los Angeles Harbor, in the State of California in the 13th Compensation District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, and that the liability of the employer for compensation under said Act was insured by Fireman's Fund Insurance Company; that on said day the said employee while performing service for the employer as a laborer and engaged at ship repair operations on a completed vessel on navigable waters of the United States at said Harbor, sustained personal injury occurring in the course of and arising out of his employment and resulting in death the same day as follows: He fell from a ladder while descending into a tank of the ship, sustaining fatal in-

jury; that the employer furnished the employee with medical treatment, etc., in accordance with Section 7(a) of the said Act; that the average weekly earnings of the employee at the time of his injury exceeded \$37.50; that the employee left surviving him and dependent in fact upon him for support his mother, Louise Johnson, Sr., born December 28th, 1905, and adult sister, Louise Johnson, born December 11, 1922, a child of said Louise Johnson named Joseph Charles Forest Johnson born October 19, 1945, and the following minor brothers and sisters: Lucille Idel Johnson born February 28, 1929, Edwin Johnson born July 22, 1930, Hilda Mae Johnson born March 30, 1932, Harold Johnson born April 4, 1934, Walter Johnson born June 22, 1936, and Rosalis Johnson born November 20, 1940; that claimants Louise Johnson, Sr., Lucille Idel Johnson, Edwin Johnson, Hilda Mae Johnson, Harold Johnson, Walter Johnson and Rosalis Johnson are entitled to a death benefit at the rate of 25 per cent of the average weekly wages of the employee for Louise Johnson, Sr., his mother, and 15 per cent of said weekly wages for each of the said minor brothers and sisters, the share of each minor child to run until such child reached or will reach the age of 18 years, provided however, that the total allowance to all dependents may not exceed $66\frac{2}{3}$ per cent of said average weekly wages or \$25.00 a week. That such death benefit at the rate of \$25.00 a week shall be paid to Louise Johnson, Sr., for the support and maintenance of herself and said minor children, commencing with the date of the death

of the said Robert Johnson, Jr.; amount accrued to and including the date of the hearing July 2, 1946, 29 5/7 weeks is \$742.85, no part of which has been paid; that Louise Johnson, a sister born December 11, 1922, was wholly dependent upon the deceased employee at the time of his death for her support but was over the age of 18 years and has not been shown to have been physically or mentally incapacitated from earning her living, and is not entitled to share in said death benefit; that a child of said Louise Johnson, Joseph Charles Forest Johnson, born October 19, 1945, was a nephew of the deceased employee and wholly dependent upon him for support at the time of his death, but is not within the relationship to the employee within which valid claim may be made for death benefit; that the reasonable expense of burial of the employee was over \$200.00 and that \$511.75 is owing thereon by claimant to W. D. Fisher & Son, Inc., Undertakers, 4700 Avalon Blvd., Los Angeles; that claimants are entitled to an allowance of \$200.00 upon said burial expense to be paid direct to said undertaker, that J. Warren Woodville, claimant's attorney, 821 Maison Blance Building, New Orleans, 16, La., has rendered legal service to claimants in the above matter in the present claim for which a fee is approved in the sum of \$65.00 and lien granted thereon on compensation herein awarded."

The employer and carrier instituted a proceeding for judicial review of the compensation order pursuant to Section 21(b) of the Longshoremen's Act (33 U. S. C. A. Sec. 921(b)) alleging in substance that the compensation order was not in accordance with law.

The court below by judgment on March 15, 1948, sustained the award of the Deputy Commissioner and it is from said judgment that this appeal is taken.

ARGUMENT.

I.

The Findings of the Deputy Commissioner as to the Dependency of the Mother and Brothers and Sisters Is Supported by Evidence.

Following is a reference to so much of the testimony taken at the hearing before the Deputy Commissioner as is considered sufficient to show that the above-mentioned finding of fact of the Deputy Commissioner is supported by evidence. This reference is not intended to cover all of the testimony, as under the authorities it is necessary only to show that there is evidence to support the findings of fact of the Deputy Commissioner.

Louise Johnson, Sr., the claimant, herein testified at the hearing on July 16, 1946, that she lives at 8821 Cohn Street, New Orleans; that she is 41 years of age and is the mother of the deceased and that Robert Johnson, Sr., is the deceased's father; that she and the boy's father married on December 23, 1919, at New Orleans, and have lived together ever since; that the deceased was born May 27, 1924, making him 21 years of age on last May [Ap. 22, 23]; that the deceased went to the West Coast in the early part of 1944 [Ap. 49]; that he contributed to her support; that he sent her \$30.00 (a week) when he first went out there and then \$15.00 per week until her daughter (who also went to California in December, 1944 [Ap. 28], became pregnant [Ap. 25] (the child was born October 19, 1945) [Ap. 33]; that before her daughter became pregnant the deceased sent her money regularly but after that he sent money from time to time but not regularly [Ap. 52]; that her son sent her money all during 1945, the last time being in November when he sent her two \$10.00 bills; that in the previous July or August her

son sent her \$15.00; that in June before that he sent her \$15.00 [Ap. 26, 27]; that she also received some money in May, the amount of which she could not remember [Ap. 28]; that she received these payments through the Western Union and when she went to the Western Union to get some record of these she was informed that she would have to know the dates [Ap. 29, 53]; that deceased sent her \$30.00 in April, 1945, at Easter time to get clothes for the children; that from January 1, 1945, until she received the \$30.00 at Easter, he used to send her money the first part of the month regularly until he had to take care of her daughter (the deceased's sister) who had become pregnant in California [Ap. 29]; that her deceased son then supported her daughter for a time *beginning about four or five months after the daughter became pregnant but that previous to that the daughter was living with her common-law husband* with whom she had been living since she went to California in early December, 1944 [Ap. 34, 35]; that her daughter had gone to work in a rubber factory that same December [Ap. 39]; *that previous to her son helping her daughter she used to receive from her son \$15.00 twice a month right along*, and sometimes three times a month [Ap. 29]; that she received \$15.00 in March by Western Union money order on two different occasions [Ap. 30]; that with the money which she received from her son she took care of her six children; that the money she received was spent on these children toward their support; that she used it to buy clothes and food for them and to send them to school, and that one girl graduated on the money which her son sent; that all the money which she received from her son was spent for these purposes [Ap. 32]; that the deceased also sent her money during the year 1944 [Ap. 49]; that during all this time her husband was making \$28.00 a week and there were six children being supported

besides herself and her husband [Ap. 53, 54]; that none of these children were working and they were paying \$12.00 a month rent for their home; that the whole family had to be supported out of her husband's income which was insufficient to meet the living expenses; that she could not get along with what her husband made because of the high prices [Ap. 54]; that that was the reason why the deceased went to Washington State, to make more money and help to support the family and this was why he sent the money to help support the children, his father and herself [Ap. 55]; *with this money she bought clothing and paid for all other necessities for herself, the children and her husband, and for the upkeep of her home; that she relied upon and looked forward to receiving the money her boy sent her to help meet the family expenses; that she had no other source of help other than her husband as none of the other children were working* [Ap. 56, 57]; that besides her rent of \$12.00 per month, she had to pay insurance totaling about \$18.00 per month, and something over \$8.00 per month as payment on their furniture [Ap. 59, 60].

At the same hearing it was stipulated that the deceased's wages at the time of his death were \$29.62 per week [Ap. 20].

It is submitted that the above testimony supports the deputy commissioner's finding that the mother and minor brothers and sisters were dependent upon the deceased employee.

The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review: *Cardillo, Deputy Commissioner, v. Liberty Mutual Ins. Co.*, 330 U. S. 469 (1947); *South Chicago Coal & Dock Co., et al., v. Bassett, Deputy Commissioner*, 309 U. S. 251 (1940):

Del Vecchio v. Bowers, 296 U. S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U. S. 162 (1933); *Crowell, Deputy Commissioner, v. Benson*, 285 U. S. 22 (1932); *Jules C. L'Hote, et al., v. Crowell, Deputy Commissioner*, 286 U. S. 528 (1932), 71 C. J. 1297, Sec. 1268; *Parker, Deputy Commissioner, v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Marshall, Deputy Commissioner v. Pletz*, 317 U. S. 383 (1943).

The deputy commissioner's findings of fact in questions of dependency are final and conclusive when supported by evidence: *Jules C. L'Hote v. Crowell, Deputy Commissioner*, 286 U. S. 528 (1932). (Accord: *Texas Employers Ins. Assoc. v. Sheppard, Deputy Commissioner*, 62 F. 2d 122 (C. C. A. 5, 1932); *Harris v. Hoage, Deputy Commissioner*, 66 F. 2d 801 (App. D. C. 1933); *Ottenstein v. Britton, Deputy Commissioner*, 160 F. 2d 253 (U. S. App. D. C. 1947).) In the *L'Hote* case, *supra*, the Supreme Court in a *per curiam* opinion reversed the United States Circuit Court of Appeals for the Fifth Circuit in a case where the District Court and the Circuit Court of Appeals had failed to give *conclusive effect* to a finding of the deputy commissioner in a case involving a question of dependency, where there was evidence to support the finding.

The decisions under the Longshoremen's Act, to the effect that the question whether the parent of a minor child was dependent upon him is one of fact, are consistent with the decisions under other like compensation laws. This accord may be noted by comparison with the following cases: *Sallee v. Calhoun*, 46 N. M. 468, 131 P. 2d 276 (1943); *Moorer v. Putnam Lumber Co.* 29 S. E. (2d) 709 (Ga. App. 1944); *Wilken v. Shein's Express Co.*, 131 N. J. L. 450, 37 A. 2d 47 (1944); *Crossett Lumber Co. v.*

Johnson, 187 S. W. 2d 161 (Ark. 1945); *Froman v. Banquet Barbecue*, 284 Mich. 44, 278 N. W. 758 (1938); *Garbutt v. Stoll*, 287 Mich. 393, 283 N. W. 624 (1939); *Batelbo v. J. H. Tredenwick*, 64 R. I. 326, 12 A. 2d 282 (1940); *Guidry v. Swift & Co.*, 199 S. 619 (La. App. 1941); *Smith v. Roth Cadillac Co.*, 145 Pa. Super. 292, 21 A. 2d 127 (1941); *Crane Co. v. Industrial Comm.*, 378 Ill. 190, 37 N. E. 2d 819 (1941).

Under the Longshoremen's Act it is not necessary to establish total or complete dependency, nor does the Act provide that the dependency shall be to a *substantial extent*. A showing of *partial* dependency satisfies the statute. See *Leon A. Harris, t/a L. A. Harris Company, v. Hoage, Deputy Commissioner*, 66 F. 2d 801 (App. D. C. 1933); *Pocahontas Fuel Company, Inc., v. Monahan, Deputy Commissioner*, 41 F. 2d 48 (C. C. A. 1, 1930); *Michigan Transit Corp. v. Brown, Deputy Commissioner*, 56 F. 2d 200 (D. C. Mich. 1929); *Texas Employers' Insurance Association v. Sheppard, Deputy Commissioner*, 62 F. 2d 122 (C. C. A. 5, 1932); *London Guarantee and Accident Company, Ltd., v. Hoage, Deputy Commissioner*, 75 F. 2d 236 (App. D. C. 1934); *Wende v. McManigal, Deputy Commissioner*, 135 F. 2d 151 (C. C. A. 2, 1943); *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, Deputy Commissioner*, 154 F. 2d 560 (C. C. A. 4, 1946); *Ottenstein v. Britton, Deputy Commissioner*, 160 F. 2d 253 (U. S. App. D. C. 1947).

See also the following additional compensation cases wherein an award was affirmed, involving questions of dependency (nearly all as partial dependency cases) arising out of contributions of deceased sons to the support of their parents and other relatives: *Paul v. State Ind. Accident Com.*, 272 Pac. 267 (Ore. 1928); *Pusher v. American*

Ry. Exp. Co., 183 N. W. 839 (Miss. 1921); *Associated Employers' Reciprocal Ass'n v. Lawrence*, 264 S. W. 1038 (Tex. 1924); *States Engineering Co. v. Harris*, 146 Atl. 392 (Md. 1929); *Scuddy Coal Company v. York*, 26 S. W. 2d 34 (1930); *Ogden City v. Industrial Commission of Utah*, 193 Pac. 857 (Utah 1920); *Bylow v. St. Regis Paper Co.*, 166 N. Y. Supp. 874 (N. Y. 1917); *Kostemo v. H. G. Christman Co.*, 214 Mich. 652, 183 N. W. 902; *In re Peters*, 116 N. E. 848 (Ind. 1917); *Littell v. Lagonarcino Grape Company*, 17 N. W. 2d 120 (Iowa 1945); *Arthur Murray Co. v. Cole*, 189 S. W. 2d 614 (Ark. 1945); *Harvey v. Rocklin Mfg. Co.*, 24 N. W. 2d 402 (Iowa 1946).

In *London Guarantee and Accident Company, Ltd., v. Robert J. Hoage, Deputy Commissioner*, *supra*, 75 F. 2d 236, which arose under the *Longshoremen's Act* as applied in the District of Columbia and where it was held that the mother of a deceased employee was dependent upon him, notwithstanding that the employee's father at the time of the son's death was regularly employed and was receiving wages in the amount of \$77.00 a week. The court in this case said:

"The family kept no records of the housekeeping disbursements, but the father and mother estimated the expenses of maintaining the family at approximately \$4,000 a year. All of this, apparently, was paid out of a fund handled by the mother and recruited from time to time by the wages, in whole or in part, of the father and the two sons.

* * * * *

"We do not mean to be understood as intimating that the mere possession of the bare necessities of life is sufficient to take one out of the role of dependency where other circumstances bring that condition into

operation, nor to confine our definition of dependents to those persons who are not able to support life without assistance, *for if in fact they depend on such assistance as a part of their means of living, and help from others is necessary to sustain them in the position to which they are accustomed to live, they would, as we think, be properly classed as dependents under the statute.*

* * * * *

“The case of the mother presents a somewhat different problem. She had neither property nor income and was wholly dependent on others for her maintenance, and, while it is true her husband owed her the duty of support and had the means to discharge it, the evidence liberally construed in favor of her claim, as we think it should be, may be said to show that *she relied on and received from her son regularly monthly sums of money, which she used and required in part for her support.* That she lived better and more comfortably as the result of the son’s contribution does not destroy her claim of partial dependency. It is enough if she depended and relied on what he gave to enable her to enjoy the ordinary and reasonable necessities of life suitable to a person in her position. This, as we think, the evidence shows.” (Emphasis supplied.)

In *Texas Employers Ins. Assn. v. Sheppard, Deputy Commissioner, supra*, in the fifth circuit, the court stated:

“Within the meaning of the act the father and step-mother of the deceased may have been partially dependent on him, though his contributions were not necessary to enable them to be supported without the help of another or others. The fact that much of the larger part of money used in the support of the family was supplied by the father was not inconsistent with

the father and stepmother being partial dependents of the deceased if the contributions the latter was in the habit of making were required to enable them to meet the reasonable necessary expenses of living in the way to which they were accustomed, and they looked forward to and relied on the continuance of such contributions for their support."

See also *Michigan Transit Corp. v. Brown, Deputy Commissioner, supra*, wherein the court stated:

"Dependency has been generally held not to mean absolute dependency for the necessities of life, but rather that applicant *looked to and relied upon the contributions of the injured employee in whole or part as a means of supporting and maintaining himself or herself in accordance with the accustomed mode of life.*" (Emphasis supplied.)

In the recent case of *Wende, et al., v. McManigal, Deputy Commissioner, supra*, in the second circuit, the court said:

"Parents are dependent if their own resources are not sufficient to support them, even if they receive help from their other children. To be sure, the parents were not dependent in the sense that they would have been destitute without decedent's financial assistance. But that is not the test; *the test is whether his contribution was in whole or in part a means of maintaining them in the manner in which they had been living and whether they looked forward to and relied upon the continuance of decedent's contributions to that end.*" (Emphasis supplied.)

In *Norfolk Shipbuilding & Dry Dock Corp. v. Parker, Deputy Commissioner, supra*, in the fourth circuit, the court said:

“These findings were based on testimony of the mother to the effect that she used the full amount of the money paid to her by her deceased son in the home and in paying bills for food and other household expenses, and that while she kept no accounts she felt after his death the lack of the money which he had paid to her in his lifetime and realized that she did not have as much to spend for the family as she had had prior to his death. The appellant contends that since the mother did not furnish any figures to show the amount spent by her for food in the household, or to show that the weekly payments of \$15 by the son exceeded the cost of the meals and other expenses entailed by reason of the presence of himself and his wife in the family circle, therefore there was no substantial evidence to support the finding of dependency. We do not think that this argument is tenable. There was enough in the record to support the conclusion of the Deputy Commissioner that the expense of housing and feeding the family of five, including the son and his wife, was more easily borne with the weekly payment of \$15 included in the family budget than it was after the payment ceased and the son and his wife no longer were members of the family. That indeed was the substance of the mother’s testimony; and it does not appear that the general household expenses, other than food, were substantially greater because of the presence of the son and his wife in the family group.

The appellant suggests that after the son’s death the mother could have more than made up the loss of income derived from him by furnishing room and board to an outside couple at more than \$15 per week. We do not understand that dependency, as a term as

used in the statute, is to be determined on such a basis. The statute expressly provides, 33 U. S. C. A. App. sec. 909(f), that all questions of dependency shall be determined as of the time of the injury; and it is generally held under compensation acts that the right of a parent to death benefits does not turn upon the ability of the parent to support life after the death of the child, but recovery is allowed where the parent depended, at least in part, for the maintenance of his accustomed standard of living upon the contributions of the deceased. *London Guarantee & Accident Co. v. Hoage* (App. D. C.), 75 F. 2d 236; *Enginecring Co. v. Harris*, 157 Md. 487; *Pusher v. American Ry. Exp. Co.*, 149 Minn. 308.

In the instant case the evidence indicates partial dependency upon the assistance of the son, and partial dependency is sufficient to support an award of the percentage of the wages of the deceased specified in the statute; *Harris v. Hoage*, App. D. C. 66 F. 2d 801; *Texas Employers' Ins. v. Sheppard*, 5 Cir. 62 F. 2d 122; *Pocahontas Fuel Co., Inc., v. Monahan*, 1 Cir., 41 F. 2d 48."

In *Pocahontas Fuel Co. v. Monahan*, deputy commissioner, *supra*, in the first circuit, the court said:

"We do not regard the fact that the father was possibly earning sufficient money to support himself alone as the test of his dependency."

Following are cases in which awards were made under the New York compensation law from which the Longshoremen's Act was largely adopted, for fatal injuries to sons who had lived in their parents homes, as reported

in the New York State Industrial Commission Special Bulletin No. 161, on page 146:

"A rigger hurt by a fall; award to mother; lived with her and her husband whom she had married within the year; had supported her before the marriage; after it, gave her \$9 a week regularly and other money, presents and supplies now and then: *Blauvelt v. Thurber*, 221 App. Div. 826."

"A steamfitter's helper killed by a fall; award to mother; lived with her and her husband, his stepfather, who was sickly; gave her \$25 or \$30 a week; she herself earned living premises and \$10 a month as a caretaker: *Donnelly v. Kingsley & Co.*, 221 App. Div. 823."

"A nineteen year old solderer fatally injured while using an air jack; award of accrued disability compensation and death benefits to his mother; lived with parents and four other children; paid \$7 of his \$18 weekly earnings into the family pot; his father earned \$37 a week; *Hobart v. Prest Air Devices*, 224 App. Div. 799."

"A carpenter killed by an elevator; award to his seventy-two year old grandmother; mother insane; grandmother had taken her place and reared him with his four brothers and sisters; he had contributed \$15 a week to the family pot: *Janecock v. Bonded Floors Co.*, 223 App. Div. 805."

"A twenty-two year old lineman electrocuted by a live wire; award to father and mother; lived with them on fifty-three acre farm; father's age was sixty-four; son gave mother \$5 a week, also gave father money to buy food and pay taxes: *Jansen v. Harlem Valley Electric Corp.*, 222 App. Div. 786."

“A pumpman killed by falling roof rock; award to mother; lived with parents, two brothers and a sister; father had been unwell; earned more than father; gave mother \$15 a week and bought things for the house; *Linderman v. Beaver Products Co.*, 222 App. Div. 844.”

“An eighteen year old laborer killed by a fall; award to father; lived on ten acre farm with father; mother and sixteen year old sister; mother and sister did not file claims; son had promised to help pay for and stock the farm; had worked for his employer but ten days: *Rifenbark v. Mohawk Limestone Products Co.*, 224 App. Div. 803.”

“Boilermaker’s helper, twenty-one years old, killed by collapse of a scaffold; award to mother; lived with father, mother, three brothers and a sister; home mortgaged; father earned \$24 a week; deceased \$23, of which \$13 went to the family; *Sidoti v. Dutchess Bleachery*, 222 App. Div. 705.”

Temporary Suspension of Contributions.

The temporary suspension or reduction, in whole or in part, of the contributions from the deceased to his mother during the period in which he was caring for his sister did not as appellant contends change the status from dependency to non-dependency. The dependency continued even though the deceased temporarily was unable to supply the need both of his sister and of his mother and her family. The courts have uniformly so held in similar situations.

Section 9(f) of the Longshoremen’s Act (33 U. S. C. A. Sec. 909(f)), provides that all questions of dependency shall be determined as of the time of injury, or, to state it otherwise, the determinative question is whether the

claimant was dependent upon the deceased at the time of the injury (or death, as a previous section includes "death" within the term "Injury." In the instant case the injury and death occurred on the same day).

Dependency is a condition wherein the dependent person looks to another source than his own means for his support. *Utah Fuel Co. v. Industrial Comm.*, 15 P. 2d 297, 80 Utah 301; *Ash v. Modern Sand & Gravel Co.*, 122 S. W. 2d 45, 234 Mo. App. 1195. In order to determine whether that condition or status existed at the time of injury and whether claimant actually did, or might reasonably be expected to, look to deceased for support, it is necessary to consider evidence leading up to and prior to the date of injury. In other words, while the status or condition has to be determined as of the time of injury, the evidence upon which the determination of that status or condition is to be made obviously cannot be confined to the date of injury.

The evidence usually presented to show dependency relates to contributions made by deceased to the claimant. If the evidence shows that deceased for some time prior to the injury contributed to the support of the claimant, who had no other means of support or whose means of support were insufficient, the proof would establish dependency. As indicated above, proof of contributions is the evidence usually presented, but the condition of dependency could exist although there is no evidence that at the time of injury the deceased was actually making contribu-

tions to the dependent; for example, a parent may be dependent upon a child and the latter, although he recognized the dependency in the past, may have been temporarily unable, by reason of illness, unemployment or other circumstances, to make contributions just prior to the injury. *Empire Zinc Co. v. Industrial Comm.*, 77 P. 2d 130, 102 (Colo. 1937); *LaSalle County Carbon Coal Co. v. Industrial Comm.*, 356 Ill. 421, 190 N. E. 627 (1934); *Shaffer v. Williams Bros.*, 44 S. W. 2d 185, 226 No. 635 (1931); *Illinois Steel Co. v. Industrial Comm.*, 139 N. E. 921, 308 Ill. 466 (1923). In the *LaSalle* case, *supra*, the deceased employee had for several years paid \$25.00 per month regularly to his older brother and sister-in-law for the support of his aged father who had been unable to work for six years. For two months he failed to pay the \$25.00 per month for his father's keep when it became due, but shortly before he was killed he told his father that when he got his first pay he would pay all arrears due. The court said:

"The record discloses ample competent evidence to establish the dependency of plaintiff upon his deceased son when the latter met his accidental death. The evidence shows conclusively that the two months' break in monthly payments for plaintiff's board did not disestablish the relation of dependency which all the parties had recognized for years. * * * This testimony, in effect, established that the failure of Louis to pay for his father's support was temporary only, necessitated by his present lack of money. It

was proper, though not essential, to show the cause for the lapsed payments by the only persons who knew about it, even though other competent evidence clearly showed a continuing and long established dependency. On questions of dependency, the workmen's compensation act should receive a practical and liberal construction. Dependency, once recognized and firmly established by regular contributions for support over a reasonable course of time, is not abruptly terminated by a temporary failure of the contributor to meet his obligations of support as they become due, in the absence of proof that the relationship has definitely ceased to exist by the action of one or both of the parties."

In the case of *Williams v. John B. Kelly Co.*, 193 Atl. 79 (Pa. Sup. 1937), a mother sought compensation for the death of her son. It appeared that he had helped to support his mother in the past but that owing to his unemployment, the contributions had temporarily ceased; he secured employment again, but was killed shortly after his first pay from which he had sent her nothing, owing to the necessity of buying shoes and clothing; he had, however, expressed an intention of sending her money from his new employment. The court said:

"The fact finding authorities were warranted in finding that claimant was patrially dependent upon her deceased son. The fact that no contributions were made from the one pay the son received is fully explained by the boarding housekeeper—that they were used by him to buy needed shoes and clothing. Such

temporary cessation of contributions did not establish that the dependency, which previously existed, had ceased. The testimony would have warranted a finding that the mother was actually in need of support, as she was unemployed and had been subsisting upon the contributions made by the son and the married daughter. Under such proof, where contributions were in fact made by the son, his legal obligations to maintain and support his mother qualified her as a dependent.”

As illustrating the point that contributions are not the *sine qua non* in proof of dependency, in the case of *Balchazar v. Swift & Co.*, 120 So. 896, 10 La. App. 25, a parent in destitute circumstances at the time of death of her son, was held “actually dependent” upon him, under the workmen’s compensation law, in view of the legal duty of a child to maintain his parent in need, as provided by the State law, although the deceased child in this case had never in fact contributed anything to the support of his parent, prior to injury. In another case, under the Federal statute, authorizing recovery for death of an interstate railroad employee, it was stated that “dependency” may be founded upon a merely moral obligation resting upon the deceased to render such aid, since a “dependent” is one who is sustained by another or relies for support upon the aid of another, to whom he looks for reasonable necessities consistent with dependent’s position in life. (*Saderstrom v. Missouri Pacific R. Co.*, Mo. App. 141 S. W. 2d 73, 79.)

In another case, arising in Georgia, where under the law dependency must have actually existed at the time of the accident *and three months prior thereof*, it was recognized that physical contributions of cash or supplies are only evidential of such dependency, and the fact that they were temporarily interrupted by unemployment, or some cause independent of the will or desire of the employee, and were not made continuously for the three-month period immediately preceding injury as the statute requires, will not necessarily negative dependency, where other evidence showed such dependency. (*Maryland Casualty Co. v. Campbell*, 129 S. E. 447, 34 Ga. 311 (1925).)

The *need* of the dependent having been established, dependency upon the employee can be shown in other ways, one of which would be by acknowledgment on the part of the employee of his intention, will or desire to aid the dependent, in recognition either of his moral or legal obligation to do so, which may derive support from evidence of his past performance in this respect. The facts in each case are largely controlling, and even though the dependent may have several children, in some cases the dependent may show that a particular child was the one looked to or relied upon for aid, and with respect to whom there may reasonably be expectation of such aid, even though fortuitous circumstances may have temporarily prevented actual contributions.

It is respectfully submitted that the evidence clearly shows the partial dependency of the mother and minor brothers and sisters at the time of her son's injury and

death of a degree well within the degree of dependency shown in the cited decisions and is sufficient to support the finding of dependency at that time. (Section 9(f) of the Act, 33 U. S. C. A. Sec. 909(f) provides that all questions of dependency shall be determined as of the time of injury.

Appellants' statement that some of the deceased's contributions were made before he arrived at the age of twenty-one years and intimating, if not asserting, that they were not "voluntary" contributions and should not be considered in the determination of whether the deceased contributed to the support of his mother and brothers and sisters, is obviously based upon a misapprehension that a parent (or brothers or sisters) could not be dependent upon involuntary contributions which is erroneous reasoning on its face. The Act does not provide that dependency must be shown by voluntary contributions and no court has ever so held that we are aware of; in fact, as shown above, the courts have held that a finding of dependency may be proper even where because of circumstances there was no evidence of *any* contributions at the time of injury. In the case cited by appellants, *Standard Dredging Corporation v. Henderson*, 150 F. 2d 78, 80, the court stated that voluntary contributions may tend to show a need for them; it does not necessarily follow that if the contributions are involuntary they are not evidence of dependency and if said court intended such holding it is respectfully submitted that it is not consistent with the weight of construction in similar cases.

Limitation of \$7500.00.

Appellants apparently contend (p. 25 *et seq.*) that in the case of an award to a mother and minor brothers and sisters, based upon partial dependency, the limitation should be less than the \$7500.00 maximum provided in the Act. There are several answers to the contention: (a) that it was not raised in the court below and hence should not be considered here. (*Helvering v. Tex-Penn Co.*, 300 U. S. 481, 498 (1937); *Ex parte Keiyo Kamiyama*, 44 F. 2d 503, 505 (C. C. A. 9, 1930); *Hecht v. Alfaro*, 10 F. 2d 464, 466 (C. C. A. 9, 1926); *Kortz v. Guardian Life Insurance Co. of America*, 144 F. 2d 676, 679 (C. C. A. 10, 1944); *Goldie v. Cox*, 130 F. 2d 695, 715 (C. C. A. 8, 1942); *Reconstruction Finance Corp. v. Sun Lumber Co.*, 126 F. 2d 731, 738 (C. C. A. 4, 1942); *Ramming Real Estate Co. v. United States*, 122 F. 2d 892, 893 (C. C. A. 8, 1941); *Atlantic Brewing Co., Inc. v. Wm. J. Brennan Grocery Co.*, 79 F. 2d 45, 47 (C. C. A. 8, 1935).) (b) The Act provides that the total compensation shall be limited to \$7500.00 (Section 14(m), 33 U. S. C. A. Section 914(m) and a provision is not qualified in any manner. (c) Even if appellants' contention that partially dependent brothers and sisters should be limited more than children of a deceased employee, brothers and sisters of employed brothers are usually within close proximity to eighteen years of age, which is also a limitation upon their compensation award, whereas children of a deceased may or may not be near the age limit of eighteen years. However, all this is a matter for legislative policy and discretion rather than judicial construction, and appellants do not suggest what amount to apply in place of the \$7500.00 limitation provided in the Act.

Award After Death.

Appellants state (p. 30) that

“It is difficult to understand how any person could be dependent upon another person after the death of such last mentioned person. Appellants contend that the only reasonable construction of said Section 9 of the Act as applicable to the case at bar would be one which restricts the total award in favor of the mother to 25 per centum of the average wages earned by Robert Johnson, Jr., during the time she is able to prove she was actually dependent upon him if such dependency existed at the time of the injury and a limit of 15 per centum of such average wages earned by Robert Johnson, Jr., during the time the minor brothers and sisters are able to prove that they were actually dependent upon him if such dependency existed at the time of the injury.”

Of course the entire purpose of the compensation law is to protect the dependents of the deceased employee “during dependency” as he protected them while he was alive. To construe “during dependency” with reference to the period of payment of compensation to dependents as being a period prior to the death of the deceased employee, would be inconsistent with the purpose of the law. The death benefit obviously is prospective.

II.

Findings of Fact and Conclusions of Law in the Court
Below Were Not Necessary.

With reference to the findings of fact and conclusions of law we agree with the appellants that the Court, unless there is a trial *de novo*, has "no power to make findings of fact" in a review of administrative action. For a decision to that effect see *Chicago, M. & St. P. and P. R. Co. v. Scandrett*, 138 F. 2d 433, 435 (C. C. A. 7). Accord: *Steamship Terminal Operating Company v. Schwartz*, 1943 American Maritime Cases, page 90 (which arose out of the Longshoremen's Act). Compare: *Lucking v. Delano*, 122 F. 2d 21 (App. D. C. 1941); *Thomas v. Peyser*, 118 F. 2d 369 (App. D. C. 1941); *Somers Coal Company v. United States*, 6 Federal Rules Service, 52 a. 1., Case No. 1. In judicial review under the Longshoremen's Act all that is required is an order or judgment to dismiss the complaint (if that is the decision). A trial *de novo*, if requested (there was no such request in the instant case) is proper in a proceeding for judicial review under the Longshoremen's Act only as to constitutional, judicial questions. (*Crowell v. Benson*, 285 U. S. 22.) The dependency of a claimant is not one of them.

Appellants inconsistently, however, complain that the court below "did not perform the required function of the District Court in matters of this kind" apparently because the court did not in some definite manner answer the contentions of the libel, "in the form of an opinion or conclusion of law." (App. Br. pp. 31 to 33.) While an opinion

in an involved case is helpful in understanding how the court arrived at a decision, where the question is whether the evidence supports a finding of dependency and the court determines that it does "there can be only one finding; that the Deputy Commissioner's findings are sustained by the evidence, and one conclusion of law; that the complaint must be dismissed." (Quotation is from Donahue's Case 1943, Amer. Mar. Cases p. 90.)

The Deputy Commissioner's Findings.

Appellants' complaint regarding the failure of the Deputy Commissioner to "discuss" the dependency and to explain "why and how the deceased's mother was a dependent of the deceased," is likewise not well taken. If the deputy commissioner were to state in the compensation order, in addition to the finding that the mother was dependent, why and how she was dependent it would mean the recitation of the evidence which showed how the mother was dependent and why she was dependent upon the deceased. The courts generally hold that only ultimate facts, not evidentiary facts, are necessary in a compensation order particularly as to an issue such as dependency which "may be proved as a fact without an arithmetical demonstration." (*Burns v. Connecticut Light & Power Company*, 97 Conn. 688, 118 Atl. 45, 146 A. L. R. 136 (1922). Accord: *Di Clavio's case*, 293 Mass. 259, 199 N. E. 732 (1936).) The weakness of Appellants' objection becomes more apparent when one attempts to comply with the request to state "why and how the mother was dependent."

We are not unmindful of the case of *Standard Dredging Corporation v. Henderson*, 150 F. 2d 78, which apparently was the source of the verbiage for plaintiffs' allegation (Article VIII(8)) as to the absence of a finding as to why and how the mother was dependent. Unfortunately in that case the insufficiency of the finding as to dependency was not the issue on appeal and was not developed or discussed in the brief on behalf of the deputy commissioner. We doubt whether the court would have held that the finding of the deputy commissioner (as distinguished from the evidence) as to dependency must show "why or how the parents were dependent" if full consideration had been given to the question. At any rate the deputy commissioner in the instant case should not be required to find "why and how the mother was dependent" in addition to the finding of dependency merely because it was so held in another case. Judicial error should not be perpetuated.

Appellants' complaint that the award was not limited to the period of dependency probably is based also upon the *Standard Dredging* case (*supra*). The court held that the award should have provided that payments were to continue "during dependency." Inconsistently the court held that the award need not provide for payment until the statutory limitation of \$7500 is reached "for the quoted provision of the Act fixes a stopping point for the payments." Why one limiting provision in the Act need not be included in the award and another similar limiting provision which likewise "fixes the stopping point for the payments" need be included, is not apparent. The hold-

ing of the court in the *Standard Dredging* case (*supra*) is not in accordance with the weight of authority in similar situations. (*Clark v. Portland General Electric Company*, 111 F. 2d 703 (C. C. A. 9, 1940); *National Engineering Corporation v. Industrial Accident Commission of California*, 225 Pac. 2, 193 Cal. 422 (1924); *Woodward Iron Company v. Pean*, 217 Ala. 530, 117 So. 52 (1928); *Shay v. Aetna Life Insurance Company*, 200 A. 302 (Pa. Super. 1938); *Franzen v. Dupont*, 36 Fed. Supp. 375 (N. J. 1941).)

Appellants object because the deputy commissioner allegedly made no finding that the dependency existed at the time of injury. There may have been no finding in *haec verba* to that effect but it is submitted that the finding that "the employee left surviving him and dependent in fact upon him for support his mother," etc. in its legal import means that at the time of his death (the date of injury) the employee was survived by his mother and sisters and brothers who were dependent upon him. The words "left him surviving" have a well recognized legal meaning; they refer to the status at the time of death. In the words of

Judge Cardozo in *Sweeting v. American Knife Company*, 226 N. Y. 200 (1919), affirmed 250 U. S. 596.

"These findings, therefore, would be adequate even if the Commission were a court, but in truth it is not a court and the niceties of court practice have no place in its procedure. Its decision states the facts essential to liability. No more should be expected."

Accord: *Nouhat v. Board of Public Education*, 48 A. 2d 20, 159 Pa. Super. 423; *Texas Employers' Ins. v. Sheppeard, deputy commissioner*, 42 Fed. Supp. 669 (1938); *Finch v. Buffalo Envelope Co.*, 217 N. Y. S. 2d, 218 App. Div. 31 aff'd 244 N. Y. S. 557, 155 N. E. 895 (1926).

III.

The Claim on Behalf of the Brothers and Sisters Was Timely Filed and Properly Adjudicated Upon the Evidence Theretofore Taken.

Appellants state (p. 21 of their brief) that no claim was filed on behalf of the minor brothers and sisters. The certified record of the deputy commissioner, however, shows otherwise. Document No. 8 therein is, in substance, a claim for compensation on their behalf. It is dated September 9, 1946, well within the one year statutory period for filing claims. The record further shows that the employer and carrier were notified of the filing of the claim. (See Document No. 9 in the certified record.) The employer and carrier consented to have the claim of the brothers and sisters adjudicated upon the record without the taking of additional evidence. (See Document No. 10 in said record.)

Conclusion.

In view of the above it is respectfully submitted that the compensation order is in accordance with law and that the judgment of the court below should be affirmed.

Respectfully submitted,

H. G. MORISON,
Assistant Attorney General,

JAMES M. CARTER,
United States Attorney,

CLYDE C. DOWNING,
*Assistant United States Attorney,
Chief, Civil Division,*

MAX F. DEUTZ,
*Assistant United States Attorney,
Los Angeles, California,*

ALVIN O. WEST,
*Attorney, Department of Justice,
Washington, D. C.,
Attorneys for Respondent Pillsbury.*

W. E. BOOTE,
Chief Counsel,

HERBERT P. MILLER,
*Assistant Chief Counsel,
Bureau of Employees' Compensation,
Federal Security Agency.*

Of Counsel.

